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Supreme Court of the United States

OCTOBER TERM, 1948

No. 671

SAMUEL TITTO WILLIAMS, APPELLANT,

vs.

THE PEOPLE OF THE STATE OF NEW YORK

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

FILED MARCH 25, 1949.

SUPREME COURT OF THE UNITED STATES

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[fols. 1-3]

IN COUNTY COURT OF THE COUNTY OF KINGS

THE PEOPLE OF THE STATE OF NEW YORK, Plaintiffs,

against

SAMUEL TITTO WILLIAMS, Defendant.

INDICTMENT

The Grand Jury of the County of Kings, by this indictment accuse the defendant of the crime of Murder in the First Degree, committed as follows:

The defendant on or about April 20, 1947, in the County of Kings, wilfully, feloniously and of malice aforethought struck and killed Selma Graff, with an iron bar.

(Signed.) Miles F. McDonald, District Attorney.

[fol. 4] ENDORSEMENTS ON INDICTMENT

(Trial)

Tried—Part 2. Jan. 5, 6, 7, 8, 9, 12, 13, 14, 15, 16, 19, 20, 21, 22, 1948.

Judge Goldstein.

A. D. A. McCabe.

Verdict—Guilty of Murder first degree with a recommendation that defendant be imprisoned for the term of his natural life. Remanded. Jury polled.

Defendant reserves all motions.

Sept. 12, 1947.

Defendant personally appears and advised by the Court of his rights pursuant to Section 308, C. C. P. Have you a lawyer? no.

Have you money to retain a lawyer? no. Do you wish the Court to assign a lawyer? Yes.

Name of lawyer assigned—Leo Healy and Harry G. Anderson, Jesse P. Griggs.

[fol. 5] No. 1721/1947—10/302-A

THE PEOPLE

vs.

J.

SAMUEL TITTO WILLIAMS

Murder First Degree
Indictment

A True Bill

William K. Cairns, Jr., Foreman.

Miles F. McDonald, District Attorney.

Pleads Not Guilty—Sept. 12, 1947.
Bail denied—Matter of Discretion. See Sec. 553 C.C.P.
Remanded.
Judge—Samuel S. Leibowitz.
A.D.A.—Rutherford Moorehead.
Filed—Sept. 12, 1947.

[fol. 6-1119] True Name: Samuel Titto Williams.
Male:—, Color: Black.
Age: 19. Nativity: Doesn't know.
Residence: 612 Rockaway Ave. Bklyn.
Occupation: Clerk.
Mechanical Trade.
Married: No.
Read and Write: Yes.
Degree of Education: P. S. & High School.
Religion: Baptist.
Degree of Religious Instruction: Irreg.
Parents Living: Mother living.
Temperate:—
Drugs: No.
Previous Conviction: none.
Sentenced to the punishment of death during the week commencing April 4, 1948.
Judge: Louis Goldstein (4).
Date: March 2, 1948.

[fols. 1120-1138] IN COUNTY COURT OF THE COUNTY OF KINGS

Brooklyn, New York City,
January 22, 1948.

(Jurors return; trial resumed.)

THE CHARGE OF THE COURT

The Court: Mr. Foreman and gentlemen of the jury:

. . . . . .

[fol. 1159] If you find, gentlemen, that the defendant has been proven guilty of murder in the first degree beyond a reasonable doubt, then there is one other provision of the law to which your attention should be directed.

Pursuant to the Penal Law of our State, a jury finding a person guilty of felony murder may, as part of its verdict, [fols. 1160-1166] recommend that the defendant be imprisoned for the term of his natural life. Upon such recommendation, the Court may sentence a defendant to imprisonment for the term of his natural life, instead of sentencing him to electrocution. Under this section, you the jury, must determine first, whether the defendant is guilty of the crime charged; and, second, whether the sentence shall be death, or whether this Court may pronounce a sentence of life imprisonment. Both questions must be determined by you, and your answer to both questions must be contained in your verdict. Until you have agreed on every part of the verdict, you cannot render any verdict in this case. In other words, you must be unanimous before you render a verdict of guilt, and in addition thereto, as part of your verdict, if you find the defendant guilty you must reach a unanimous decision on the question as to whether or not there should be a recommendation of life imprisonment, to which I have just made reference.

You must bear in mind that if you bring in a verdict of guilty as charged, without a recommendation, it means that the Court must impose the death penalty. On the other hand, if you bring in a verdict of guilty with a recommendation of life imprisonment, it means that the Court may impose a life sentence.

You must also understand that in the event you find the defendant guilty and recommend life imprisonment, that the Court is not bound to accept your recommendation.

[fols. 1167-1168] In County Court of the County of Kings

The Verdict.

The Clerk: Gentlemen of the jury, have you agreed upon a verdict? Mr. Foreman, please rise and tell us your verdict.

The Foreman: Your Honor, by unanimous vote of this jury, we find the defendant guilty of murder in the first degree with a recommendation.

The Clerk: Hearken to your verdict as the Court records it: You say you find the defendant guilty of murder in the first degree with a recommendation that he be imprisoned for the rest of his natural life, and so say you all?

The Jury (In unison): We do.

[fol. 1169] In County Court of Kings County, Trial Term, Part II

The People of the State of New York

against

Samuel Titto Williams, Defendant

(Ind. No. 1721/1947; Murder, 1st Degree)

Transcript of Proceedings on Sentence

Brooklyn, New York City,
March 2, 1948.

Before Hon. Louis Goldstein, County Judge

Appearances:

Leo Healy, Esq., Harry G. Anderson, Esq., and Jesse P. Griggs, Esq., Attorneys at law, for the defendant.

Louis Lehman, Official Reporter.

(The defendant was arraigned on sentence.)

The Clerk (To the defendant): Have you anything to say why judgment of the law should not be pronounced against you? If you have anything to say, address yourself to the Court.

[fol. 1170] The Defendant: I did not commit that crime.

The Court: Judge Healy, I will hear you, sir.

MOTION TO SET ASIDE VERDICT AND FOR A NEW TRIAL

Mr. Healy: My memory does not serve me as to whether or not at the time the verdict was rendered in this case motions were made. I therefore at this time respectfully move to set aside the verdict and for a new trial on the ground that the verdict is contrary to law, contrary to the evidence, contrary to the weight of evidence, and on all the exceptions and objections taken during the trial, and all the grounds set forth in the Code of Criminal Procedure.

The Court: I must deny that motion.

Mr. Healy: I respectfully except.

The Court: Proceed.

ARGUMENTS OF COUNSEL

Mr. Healy: On the question of sentence, if the Court pleases, the jury in their verdict in this case recommended life imprisonment. It is not the province of counsel in this case to argue the question of law as to whether or not your Honor has a discretion to follow that recommendation or not. In our argument, we proceeded on the theory that whether or not this defendant shall be sentenced to the electric chair, or whether he shall be given life imprisonment is within the discretion of the Court. The defendant at this moment maintains his innocence. The defendant during the trial maintained his innocence. The defendant when he took the stand and submitted himself to cross-examination, also maintained his innocence. So in my brief discussion of the facts, I do so with the understanding in mind that when I mention the actions of the person who was arrested for this crime, I do not at any time admit by such argument that this defendant was the person so mentioned.

[fol. 1171] Your Honor remembers during the trial, both on the direct examination and on cross-examination, the trial which was ended was a lengthy one, that particular

emphasis was stressed, particularly in the People's case as to the manner in which this killing took place.

In our appeal for a life sentence, we ask your Honor to take into consideration that when the defendant, who committed this crime, whoever he was, went to the scene of the crime, he was not armed with a dangerous weapon. I say that, and ask your Honor to take that into consideration, because counsel respectfully believe that when the Governor of our great State asked the Legislature to have this law passed permitting the jury to recommend life imprisonment, that he indeed had in mind a case where there would be mitigating circumstances; a case, for instance, where a felony murder was committed, perhaps without premeditation and deliberation, showing a distinction between a murder case where a man leaves his home armed with a dangerous weapon, with a loaded gun, and while committing a felony kills a person.

Your Honor will remember from the facts in this case, that the person who committed this crime arrived at the Graff home unarmed, and I say that we may draw from that fact, at least a moral inference that there was not the vicious intent on the part of that person to commit a murder during a felony.

You will remember that on the People's own case, the evidence was that the person who committed that crime picked up an object right at the scene of the crime in the back yard, and that when he picked up that object, I think it [fol. 1172] is a fair inference to assume that at that moment there was no idea in the mind of that person that he would use that instrument which was picked up to kill anyone in the commission of the attempted burglary.

But on the other hand, I think the evidence in the case pointed conclusively to the fact that the instrument was used to raise one of the windows at least in the Graff home.

Your Honor will remember that the bar was placed on one window, and then on another, and taken into the house and laid upon the bed. I think it is fair to assume from all the evidence, and I do not think it can be denied that when the person, whoever he was——

The Court: What was the purpose of his taking that weapon into the house if he only used it to open the window? Why did he take it into the house after he got in there?

Mr. Healy: If your Honor will bear with me, I will come to that in a moment respectfully.

The Court: Go ahead.

Mr. Healy: The evidence shows that the bar was taken into the house. The evidence shows that the bar was laid upon a bed; that when the attempted burglary took place, and the person, whoever it was, was going through that drawer, the act committed by the person was indeed, I think your Honor must agree, one of sudden impulse.

Counsel respectfully believes that when the person was interrupted during the commission of the attempted burglary, there was no idea in his mind to kill anybody at that time. Your Honor will remember specifically, not only on cross-examination, but on direct examination, that the [fol. 1173] person had his back turned toward the little Graff girl who was in the bed at the moment: that all of a sudden within a second or two, this person, whoever he was, made a sharp, quick turn, according to the evidence, and I think it is fair to assume that there was no opportunity for the person, whoever he was, to know exactly who it was who was behind him at that time; but in making that quick turn with this bar in his hand, the bar came down on a person, not known, I am sure at that time to the person who was in that room. I ask your Honor to take that into consideration in answer to the question as to why that bar was taken into that room.

I ask your Honor to also take into consideration the other facts and circumstances, all of which were adduced at the trial and all of which have been discussed completely. I see nothing to be gained by a lengthy enumeration of them at this time, because I know your Honor, appreciating as I do the serious burden that is placed upon you this morning, has probably read this record over and over again, and is possibly far more familiar with it than counsel.

Counsel truthfully and honestly and candidly believe that this is a case, Judge Goldstein, if there ever was one in our great State of New York, where the intention of our Governor and the intention of the Legislature is certainly manifested. There must have been some reason why the Governor, in requesting that this section of the law be passed, and that the Legislature in so passing it, asked that some opportunity be given to the jury to express their opinion as to whether a life sentence should be passed or whether no recommendation should be made at all.

[fol. 1174] Twelve men of our great County of Kings, twelve men not only the ordinary type of jurors, but twelve

blue-ribbon jurors, have had an opportunity to hear this evidence which I am not going to review at this time. The jury was out a considerable length of time, and undoubtedly those twelve blue-ribbon jurors of our community must have given careful and earnest consideration to their verdict. After their deliberation, they came to the unanimous conclusion in their recommendation that this defendant be sentenced to life imprisonment. They possibly, figuratively speaking, were the judges of the law on that point.

Counsel respectfully therefore asks your Honor to accept as your own determination in this case the determination of these twelve blue-ribbon jurors, and to accept the recommendation made by them, and to sentence this defendant to life imprisonment.

The Court: Does any other counsel wish to be heard?

Mr. Griggs: There are a few remarks that I should like to make, corroborating the opinion of counsel, that your Honor should follow the recommendation of the jury. No. 1. I would like to emphasize the fact that there are several factors in this case that your Honor should consider as to anybody who committed this crime. All we have here is a confession and the re-enactment at the scene.

There is Donald, the little brother, who said that a colored man did not do it, but that a white man did it, and it was only after he had gone home and appeared on the witness stand, that he had been more or less told to recollect and to [fol. 1175] remember, to think about it again, and certainly go over the thing in his mind, my conclusion was even though there was a lot of comment made that Donald was confused, Donald took the witness stand and in his own childish and infantile manner told what he thought was there. There is reasonable doubt enough there to change this thing in my opinion from the death sentence to life imprisonment.

There is also testimony—it was a witness for the People, and not a witness for the defense, and the People are somewhat bound at least by the testimony of the person whose testimony represented the People, should not be impeached, and I think after the child had gone home, a ten-year-old child, then did he change his testimony.

Another thing is important in this case. To get back to the confession that he was supposed to have made to his girl-friend, Ah Lum, if there ever was a bum and a prostitute and a no-good girl, living in that sort of situation that she

lived in, with no obvious means of support, with this woman who admitted that she was the woman's lover, in competition with the defendant himself for the love of this Ah Lum girl, we can very well see that jealousy in the heart of this woman's lover for this defendant here, causing the competition and causing some trouble about it even on the statement that they made with respect to the confession that he made that he killed somebody at some time. Those are two other factors here.

The third factor is the way the confession was extorted. The boy had rheumatic fever, and there is even testimony on the part of some police officers that when he was arrested [fol. 1176] and taken into custody that he did not have certain marks upon his body. Even Captain Sabatino, and some of the other police officers admitted that after he was taken into custody they observed a black eye and other marks. How did he get the black eye? Anyway, you are not supposed to extort confessions by violence and intimidation.

These mitigating circumstances, your Honor, plus the fact that he re-enacted the scene, yes, but under conditions that are similar to a lynching situation, according to the defense testimony, and that the pictures and what-not, of the crowd threatening him, and the mob scenes and atmosphere, I contend in our great State of New York that we do not tolerate that sort of stuff that we have in Georgia, Mississippi, and Alabama; and thus along with Judge Healy's statement, causes me as one of the defense counsel to beg and plead with your Honor to use mercy in this situation and to follow the recommendation of twelve men who are of the most eminent businessmen and students and scholars, and some of the finest men out of the three hundred, selected all day long by counsel, and these men have recommended that, and I think your Honor should take into consideration these fact- and give this boy life-imprisonment.

Mr. Anderson: I would like to say just a few words.

The Court: Yes, Mr. Anderson.

Mr. Anderson: We will not discuss the philosophy of this law or the background by which the Legislature gave the jury the power to recommend life in a murder case. Up to that time the law was very strict in a felony murder; if any man participated, even in the slightest degree, with the

[fol. 1177] underlying felony, he might not have been on the scene of the crime, he might not have even known that the men were armed, he may not even have known that there was going to be a murder, yet if he participated in the underlying felony, under the strict construction of the law which obtained under the amendment, he would be guilty of murder in the first degree and nothing else. The Court could not find any lesser degree.

A striking illustration of that was shown in the Diamond brothers case, in which case one of the defendants, whose name I do not recall, who worked in a bank, and all that he did in that case was to telephone to the Diamond brothers the time of the messenger's leaving the bank. He never did anything else. He never was at the scene. He may have known that they were going to rob, but no intention of killing, yet under the strict law which obtained at that time he was guilty of murder in the first degree, and nothing else. So, when the Legislature came to consider the rigidity of the law so to speak, and the injustice that might result, they gave the jury the power to recommend life imprisonment.

The Court: In that case, the Diamond case, the Diamond brothers did not take part in the actual hold-up. They helped to engineer the thing.

Mr. Anderson: I am not talking about the Diamond brothers.

The Court: The same as this defendant did.

Mr. Anderson: I am now talking about a third man, whose name I cannot remember.

The Court: Yes, I know that.

Mr. Anderson: Just one word more. The Legislature [fol. 1178] did not apparently make this recommendation binding on the Court, as it is practically in every State in the Union, but while it is not binding on the Court, it seems to us that since the jury, an intelligent jury, here, and I have heard the men around the court room here say that it was one of the finest juries they have ever seen impaneled in a case—they give six hours' consideration to the case, they knew all the facts, and the case was ably summed up by Mr. Healy and the District Attorney. They knew all that, and they arrived at this conclusion unanimously that there should be a recommendation.

Now, it seems to us, even though the law does not require the Court to follow the recommendation, when a jury makes the recommendation, it should be followed, because sometimes it happens that some juror who is debating, perhaps the possibility in mind that there might be an improper verdict, that somebody might be convicted and might turn out later on to be innocent by newly discovered evidence thereon, that juror in his own conscience does not want to vote the death penalty, and so sometimes, I do not say in this case, but sometimes the recommendation is a compromise between a few jurors in the case. There is room for conflict.

I think one of the striking circumstances in the case is that this defendant had this bar and had this flashlight, and had his hand on the bar, on the tin cans, and some other things, and yet with the careful preparation of this case, yet with the most careful preparation of this case, and it was well prepared by the District Attorney, there was not only no proof of any finger-prints, but no proof of any attempt [fol. 1179] to get finger-prints. They show up on this type of object that can be wielded with a man's hand; the opening of the drawer, the taking up of a box and cans, and other things. There was no line of proof that it was not possible to obtain them. Remember, this case was very carefully prepared and thought out. You never saw a case prepared with the details as this one was. No police officer was called to tell the jury, "We could not get finger-prints in this case, because this condition could not exist or did exist." There is no proof of finger-prints. Here is a case where the finger-print evidence or the lack of it was a very controlling evidence.

Getting back to what I said in the beginning, it seems to me that your Honor should follow the recommendation of this jury. You know they made this recommendation because the law gives them the power, because of a compromise verdict, or what, we do not know, but twelve of these jurors came in here after six hours of deliberation and said, "We think this man should receive life-imprisonment." It seems to me, and I strongly urge you to follow that recommendation.

The Court: Williams, do you want to say anything?

The Defendant: I did not commit the crime, sir.

The Court: Are you ready for sentence?
Mr. Healy: We are ready for sentence.

STATEMENT OF THE COURT

The Court: The defendant, Samuel T. Williams, also known as Tito Williams, was convicted of Murder in the First Degree, with a recommendation of life imprisonment, on January 22, 1948.

Counsel have moved to set aside the verdict of the jury [fol. 1180] as against the weight of the evidence, and for other reasons urged by them. They have also requested the Court to accept the recommendation of the jury in the event the motion is denied.

The defendant is 19 years of age and has been in difficulties with law enforcement agencies since he was about 11 years of age. On September 26, 1940, while he was being cared for in a foster home of the Colored Orphan Asylum, the defendant appeared in Children's Court, Queens County, before Mr. Justice Cobb, on a charge that he and an adult had forcibly entered a building and stolen personal property valued at about $500. Investigation at that time disclosed that he had not adjusted well in the boarding homes and presented problems in school. Judgment was suspended and he was discharged to the custody of the Colored Orphan Asylum.

In November, 1946, his mother charged him with being a wayward minor, on the ground that he was wilfully disobedient, kept late hours, refused to work and was in danger of becoming morally depraved. During that period of time, when his step-father, who appears to be a hard-working, diligent citizen of our community, remonstrated with him about his conduct, he became very resentful and arguments ensued which resulted in the defendant striking and assaulting his step-father. He was served with a summons to appear in the Adolescent Court, but he did not appear. As a result, a warrant was issued for his arrest, and when apprehended he was remanded to the Raymond Street jail and arraigned in the Adolescent Court on December 2, 1946. On January 9, 1947, he was placed on probation for an indefinite term by Judge Masterson and was on probation [fol. 1181] when the crime involved here was committed.

Many material facts concerning the defendant's background could not, because of the rules of evidence, be

brought to the attention of the jury which heard the testimony involving the murder of Selma Graff.

I belive it is important to consider some of the evidence, in the light of facts brought to the attention of the Court as the result of investigation by our Probation Department, and through other sources, for the purpose of considering the jury's recommendation.

The defendant has been found guilty of striking and killing Selma Graff with an iron bar in the course of burglarizing the ground floor apartment at 143 East 96th Street, Brooklyn, N. Y., where she resided with her widowed mother and her young brother, Donald, who is nine and a half years of age. The deceased at the time of the commission of this crime was only fifteen years of age, a high school student, well-liked and attractive, and on the eve of womanhood. The evening prior to the occurrence she and some of her friends were discussing a birthday party, her mother having gone to see a show with a friend in Manhattan. Mrs. Graff's husband died in 1942 and she subsists on a small social security allowance and other income of a minor nature.

On the night involved, while Selma's girl friends were in the house, her brother Donald went to bed. After her friends left, she also went to sleep. We do not know what awakened her, except from the statements made by the defendant to the police, who said that while he was going through the bureau drawer of the dresser, he felt a light [fol. 1182] blow on the back of his neck and he swung around, brutally striking her on the head with an iron bar twenty-five inches long, one inch in thickness, and continued to rain smashing blows on her head and upper parts of her body, until she fell senseless across her bed in a pool of blood. She was removed to the Kings County Hospital, given blood transfusions and placed in an oxygen tent, but despite the efforts of the competent physicians at that institution to save her life, she remained unconscious and died eight hours later as the result of this brutal assault. Her brother, Donald, having been awakened by a shriek of his sister, with no thought other than to leave the room where this was occurring, and to avoid the scene of horror which was being enacted before him, when he was awakened from a deep sleep, was also the recipient of blows on his head from the same iron bar which cut his scalp to the bone,

and resulted in severe head injuries which required his hospitalization. The wound to his head was so deep as to expose his brain. Those few moments of brutal and ruthless assault on the part of the defendant resulted in the death of an innocent young girl, the maiming for life of a young boy, both physically and mentally, and the destruction of the hopes of a mother who had had more than her share of sorrows in the loss of her husband, and her pitiful attempts to provide a happy home for her family. There were found on the body of the deceased wounds on both of her ankles as well as contusions and a puffed up and swollen condition of her left hand. There is evidence from the deceased's brother, Donald, that when he was awakened by a shout, he saw a man bending over his sister's bed. [fol. 1183] The defendant's confessions made no mention of this, although a large pool of blood was found on the bed. The conclusion reached by the police and our probation department is to the effect that not only was the defendant attempting to burglarize the Graff home, but that he also probably attempted to ravish this young girl without success. In the light of the defendant's background and other acts on his part in the process of committing other burglaries, the Court is convinced that there is a strong possibility that such a situation existed on the night Selma Graff was murdered by the defendant, although concededly there is no direct evidence of that fact or of the consummation of his purpose.

The defendant's entrance into the Graff home was the result of experience he had had on thirty other burglaries in and about the same vicinity for a period of about two months prior to the murder of Selma Graff. He was well schooled in entering homes for the purpose of burglaries, and dispite his youth, was a veteran at this type of crime. It was only due to excellent police work coupled with force of circumstances which finally led to his apprehension. In fact, when he was apprehended, no one had any thought that he was in any way connected with the Selma Graff killing. The police were on the look-out for a "night burglar" who had committed approximately thirty burglaries in that vicinity over a period of two months. Seventy-five detectives had been assigned just for the purpose of apprehending the person or persons involved, and it was their impression, based on the manner in which each of

the burglaries had been committed, and the fact that a ground-floor apartment was involved in each instance, [fol. 1184] that in apprehending the person involved in one of these burglaries, they would in all probability have the one who had committed all of them.

Sometime during the early morning hours of September 8, 1947, as a result of information that a prowler was in the vicinity, various detectives and radio patrol cars converged toward a central point at one of the streets in Brownsville and practically ringed that area with radio patrol cars and plain-clothesmen. They arrived within two minutes after receipt of this information. Detective Cullen saw the defendant emerging from a cellar areaway and when he approached him and asked him what he had been doing there, the defendant said he had been urinating. Upon examination, no such evidence was found, and the suspicions of the police were sufficiently aroused to take the defendant into custody. He was taken to the place where he was residing and there the police officials found about eighteen pawn tickets and personal property which had been reported stolen by various individuals in that vicinity.

He was then taken to the 73rd Precinct and questioned about these burglaries. During that interval, individuals who had filed complaints with the police were brought to the Precinct and either identified some of the property which had been found in the defendant's room, or actually identified the defendant. It was only later that Detective Roger Rooney had the foresight unknown to the defendant, to place among these articles a flashlight, which had been found at the scene of the Selma Graff killing, but which the police had never publicized. The defendant, when questioned about the flashlight, admitted ownership, and as a [fol. 1185] result of this he was thereafter questioned concerning the Graff murder, and not only admitted his guilt but wrote out a confession and re-enacted the crime in detail. In those confessions and the re-enactment, he indicated that he had held up the window shade by means of a twig, another fact which though known to the police, had never been divulged to anyone. Only a person who had perpetrated this crime could have known that a twig had been used and the part it had played in the crime.

Of course, he later denied he had made these confessions

voluntarily, and that they were untrue. He denied that he had anything to do with the crime. He claimed that police brutality had forced these confessions from him and as evidence of that, exhibited certain scars on his elbow, testifying that these had been caused by blows of the butts of guns held by detectives and from cigarette burns.

It is interesting to note that the medical chart obtained from the United States Navy, which information was not permitted into evidence, discloses that at the time of defendant's discharge, which was before the date of this crime, he had a one-inch scar on the left forearm near the elbow as well as other scars. This chart would therefore indicate that the defendant had this and other scars before he even committed the instant crime, and his testimony concerning police brutality, as well as other testimony, which he glibly stated on the witness stand to be the truth was in fact made up from the whole cloth, and was merely used by him in an attempt to hoodwink the jury.

[fol. 1186] The probation report indicates that the defendant is a psychopathic liar and his personality is permeated with psychosexual habits of thought and conduct. According to the testimony of the defendant, he was a boarder of Miss Yvonne Ah Lum and only paid one week's board. The rest of the time he was kept by Mrs. Ah Lum and Miss Davenport, the woman who lived with Mrs. Ah Lum. He further stated to police that on various occasions he brought different men into the apartment for the purpose of having sexual relations with these two women.

There was information from Detective Werner that while the defendant was in the uniform of the United States Navy, he observed him using a camera at one of the public schools in the Brownsville area, to take photographs of private parts of young children.

We have the case of Rose Spector whose apartment was burglarized by the defendant on August 27, 1947, at about two a. m., and who identified one of the watches found in the defendant's room by the detectives at the time he was apprehended, as a watch that had been stolen from her apartment on that date. She says that she was awakened by someone pulling the bedsheet from under her and flashing a flashlight in her face, and when the defendant saw that she had been awakened, he ran away. The defendant stole a wristwatch and a wallet containing some money

from her apartment, and admitted this crime to the detectives. He also showed the police where he had discarded the wallet which was recovered. Miss Spector positively identified the defendant as the one in her apartment at two a. m. on August 27, 1947.

[fol. 1187] We also have the situation involving the Goldiner family who resided in the ground-floor apartment at 145 Legion Street, about two weeks before his arrest at about two a. m. At that time, their seven-year-old daughter was asleep alone in a rear room, the parents being in another room. The child says that she was awakened when she felt someone twisting her feet. She says that the lower part of her pajamas had been taken off and the defendant placed himself on top of her and placed his penis between her legs. He had one of his hands over her mouth to prevent her from making any outcry. He then arose, and as he was buttoning his pants, she made an outcry which frightened the defendant, who ran out of the apartment. The mother of the child says that she found evidence of discharge on the bed of the child. The child also positively identified the defendant as the one who perpetrated this act.

The gross proceeds of the many burglaries committed by the defendant total approximately $5,000. In his room at 122 Sutter Avenue, stolen property was found, as I have indicated before, including fifteen ladies' and men's rings, three ladies' wrist-watches, one man's wrist-watch, about eighteen pawn tickets, three coin banks, which had been forced open, pornographic pictures, and a large hunting knife. Some of the pawn tickets were in the defendant's name and others were in the name of one, Alberta Davenport, who lived at the same premises and who said that the defendant had given her the property to pawn. The defendant claimed that all of the stolen property found in his room was either won by him in crap games or bought by him from different men unknown to him, for various sums of money.

[fol. 1188] There is no point in continuing any further into the defendant's background and experience as a full-time burglar. He perfected what he thought was a foolproof method of earning a living in an easy way. Like others of his kind, however, he finally found himself in a situation, not to his liking, and decided to destroy whatever was in his way to a continued success in the criminal career chosen by him. It is unfortunate that his path was

blocked by this young girl who showed such bravery, in the protection of her life. There was no reason for the wanton destruction of the life of this young girl.

The defendant had picked up the iron bar in the vicinity of the Graff home and had used it to pry open the window to enter the apartment and had laid it on the bed of the first bedroom which he entered. When he found nothing there, he took the bar along with him into the next room, and it was with the use of this bar that he snuffed out the life of this young and innocent girl in a cruel and reckless manner.

The apprehension of the defendant and his subsequent conviction was the result of excellent and intelligent police work coupled with fine cooperation on the part of the District Attorney's office of Kings County, Detective Rooney of the 73rd Squad, and Detectives Cullen and Werner of the 71st Squad, as well as Patrolman DeVivo and DiLorenzo, deserve special commendation for their efforts in bringing this defendant to justice. At the same time, credit must be given to Assistant District Attorney Perlman who investigated the matter with refreshing ingenuity and skill, as well as to Assistant District Attorney McCabe who prepared and tried this case in an able, fair, and vigorous manner.

[fol. 1189] The defendant, when he testified, showed himself to be a glib, slick, calculating type of individual. His ideas, as revealed by our probation report, revolve around a morbid sexuality, and he is emotionally unstable, unconcerned and suffers from no remorse whatsoever. He is deemed by our probation department to be a menace to society.

It is unfortunate in a trial in this nature that the jury, once it has decided upon a verdict of guilty of murder in the first degree, is not permitted to receive other evidence, which although not permissible as legal evidence in the trial itself, could be used by it in determining whether or not it would recommend life imprisonment. The Court is convinced that the defendant's glibness did help him to the extent of obtaining a recommendation from the jury, and had they been fully cognizant of all the facts, there would have been no such recommendation.

I have given this matter grave and serious consideration and have searched for any facts which would justify the acceptance of the jury's recommendation. My purpose in revealing the defendant's background was to indicate some of the facts which the Court has taken into consideration, in

weighing the recommendation of the jury. I regret that I found nothing in his favor and my conscience would not permit me to give him any consideration of this nature. The record of the defendant stamps him as a dangerous criminal and I find no basis whatsoever on which I can extend to him, in good conscience, the consideration which the jury has recommended. To adopt such a recommendation would be tantamount to a challenge to law and order in our community.

[fol. 1190] The People of the State should not be burdened with the responsibility of taking care of this defendant for the remainder of his natural life, and he deserves no merciful consideration by the Court. He must pay the extreme penalty for his brutal murder of an innocent young girl and the injuries he inflicted upon her young brother. The grief which the defendant's act brought, not only upon the family of the deceased, but upon his own family, is appalling beyond description.

Whether or not a Court should follow the recommendation of a jury in a case of this kind is by no means an easy matter to determine. There are many factors that enter into the resolution of the problem thus presented. I have given everyone of those factors its proper weight and due consideration, and it is only after such careful weighing and deliberation that I have come to the conclusion that this is an instance in which the best interests of society would not be served by following the recommendation of the jury. If, indeed, this defendant is, in the language of our Probation Department, a "menace" to our society, and I believe that he is such a menace, it is the duty of the Court to consider the recommendation of the jury in the light of that fact and the various other facts brought to the attention of the Court for the first time. Many of these facts—indeed the greater portion of them—while extremely relevant on this question, were not relevant to the issue tried before the jury. For that reason, undoubtedly, the jury made the recommendation that it did. I am fully convinced, however, that if this jury had before it the facts contained in the probation report, the recommendation would never have [fols. 1191-1197] been made. It would stultify my conscience to adopt the recommendation under such circumstances. It is not without hesitation that I have reached this conclusion,

but having reached it, I am now convinced of its absolute justice and inevitability.

I must therefore deny the motion to set aside the verdict and to refuse to accept the recommendation of the jury for life imprisonment as embodied in its verdict.

SENTENCE

It is therefore ordered and adjudged by the court that you, Samuel Tito Williams, for the murder in the first degree of Selma Graff, whereof you were convicted, be and you are hereby sentenced to the punishment of death, and that within ten days from this day, the Department of Correction of the City of New York, deliver you, said Samuel Tito Williams, together with the warrant of this court to the agent and warden of Sing Sing State Prison at Ossining, where you shall be kept in solitary confinement until the week beginning with Sunday, April 4, 1948, and that upon some day within the week so appointed, the agent and warden of the said Sing Sing State Prison at Ossining, shall do execution upon you, Samuel Tito Williams, in the mode and manner prescribed by law, and may God have mercy upon your soul.

[fol. 1198] IN COURT OF APPEALS OF NEW YORK

Pleas in the Court of Appeals, held at the Court of Appeals Hall, in the City of Albany, on the 6th day of January in the year of our Lord one thousand nine hundred and forty-nine, before the Judges of said Court.

Witness, The Hon. John T. Loughran, Chief Judge, Presiding. John Ludden, Clerk.

REMMITTITUR—January 7, 1949

THE PEOPLE OF THE STATE OF NEW YORK, Respondent,

against

SAMUEL TITTO WILLIAMS, Appellant

Be it remembered, that on the 20th day of September in the year of our Lord one thousand nine hundred and forty-eight, Samuel Titto Williams, the appellant in this action, came here unto the Court of Appeals, by Edward

H. Levine and Jesse P. Griggs, his attorneys, and filed in the said Court a Notice of Appeal and return thereto from the judgment of conviction of the County Court, Kings County, and the People of The State of New York, the respondent in said action, afterward appeared in said Court of Appeals by Miles F. McDonald, District Attorney. Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon, the said Court of Appeals having heard this cause argued by Mr. Edward H. Levine of counsel for the [fol. 1199] appellant, and by Mr. Solomon A. Klein of counsel for the respondent, brief filed by amicus curiae, and after due deliberation had thereon, did order and adjudge that the judgment of conviction of the County Court, Kings County, appealed from in this action be and is hereby in all things affirmed.

Upon this appeal there was presented and necessarily passed upon a question under the Constitution of the United States, viz: The defendant argued that his conviction violated the Fourteenth Amendment of the Constitution of the United States in that the sentence of death was based upon information supplied by witnesses with whom the accused had not been confronted and as to whom he had no opportunity for cross-examination or rebuttal; this Court held that the sentence aforesaid did not violate the Fourteenth Amendment of the Constitution of the United States.

And thereafter, on February 22, 1949, the Court, having requested the return of its remittitur for amendment, did order and adjudge that the remittitur be amended, as of January 6, 1949, to read as follows:

Judgement of conviction of the County Court, Kings County, appealed from in this action be and is hereby in all things affirmed.

Upon this appeal there was presented and necessarily passed upon a question under the Constitution of the United States, viz: The defendant argued that, as construed, Sections 1044, 1045, and 1045A of the Penal Law and Section 482 of the Code of Criminal Procedure of this state violate the Fourteenth Amendment of the Constitution of the United States in that they sanctioned or permitted the sentence of death to be based upon information supplied by persons with whom the accused had not been confronted

and as to whom he had no opportunity for cross-examination or rebuttal; this court held that neither the statutes nor the sentence aforesaid violated the Fourteenth Amendment of the Constitution of the United States.

[fol. 1200] Loughran, Chief Judge, Desmond, Dye and Fuld, JJ. concur in the granting of this amendment. Lewis and Conway, JJ. dissent as to said amendment of the remittitur.

And it was also further ordered, that the record aforesaid, and the proceedings thereon in this Court, be remitted to the said County Court.

Therefore, it is considered that the said original judgment of conviction be and is hereby in all things AFFIRMED etc. as aforesaid, and stand in full force, strength and effect.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the County Court, Kings County, before the Judges thereof, according to the form of the statute in such case made and provided.

John Ludden, Clerk of the Court of Appeals of the State of New York.

Court of Appeals, Clerk's Office

Albany, January 7, 1949.

I hereby certify, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

John Ludden, Clerk. (Seal.)

[fol. 1201] SUPREME COURT OF THE UNITED STATES

No. ———, October Term, 1948

SAMUEL TITTO WILLIAMS, Appellant,

v.

THE PEOPLE OF THE STATE OF NEW YORK

ORDER ALLOWING APPEAL

The appellant in the above-entitled cause, having prayed for the allowance of an appeal to the Supreme Court of the United States from the judgment made and entered therein by the Court of Appeals of the State of New York on the 6th day of January, 1949, and having presented his petition for appeal, assignment of errors, prayer for reversal, and statement as to jurisdiction, pursuant to the Rules of the Supreme Court of the United States in such case made and provided;

It Is Now Here Ordered that an appeal be, and the same is hereby, allowed to the Supreme Court of the United States from the Court of Appeals of the State of New York in the above-entitled cause, as provided by law, and it is further ordered that the Clerk of the County Court, Kings County, State of New York, shall prepare and certify a transcript of the record, proceedings and judgment in this cause and transmit the same to the Supreme Court of the United States, so that he shall have the same in said court within forty days of this date, or within such time as may be specified by a further order of this Court.

Dated this 23rd day of February, 1949.

Wiley Rutledge, Associate Justice of the Supreme Court of the United States.

[fol. 1202] SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS UPON WHICH APPELLANT INTENDS TO RELY AND DESIGNATION OF PARTS OF THE RECORD TO BE PRINTED ON APPEAL AS NECESSARY FOR THE CONSIDERATION OF SUCH POINTS—Filed March 25, 1949

To Charles Elmore Cropley, Esq.,
Clerk of the Supreme Court of the United States:

In accordance with Rule 13 (9) of the Revised Rules of the Supreme Court of the United States the following is a statement of the points upon which appellant intends to rely upon his appeal herein:

(1) The Court of Appeals of the State of New York erred in its decision that certain statutes of the State of New York, to wit, Sections 1044, 1045 and 1045-a of the Penal Laws of the State of New York, and Section 482 of the Code of Criminal Procedure of the State of New York, are valid and are not repugnant to the 14th Amendment to the Constitution of the United States, when construed by said Court, in its judgment appealed from, so as to permit the Trial Judge to disregard the recommendation of a life sentence by the jury before whom appellant was tried and convicted of felony-murder in the first degree, and to sentence appellant to death, based on the evidence of witnesses with whom appellant had not been confronted and as to [fol. 1203] whom appellant had been afforded no opportunity for cross-examination or rebuttal.

(2) The said Court of Appeals erred in failing to decide that such statutes are invalid and repugnant to the 14th Amendment to the Constitution of the United States, unless construed to limit the right of a Trial Judge to disregard the jury's recommendation of a life sentence and to sentence an accused to death, either on the basis of evidence already of record at the time of the jury's verdict, or if on the basis of evidence subsequent to the jury's verdict, only where the accused is confronted before the Trial Judge with witnesses giving such evidence and is afforded opportunity for cross-examination and rebuttal.

(3) The said Court of Appeals erred in affirming the judgment of conviction and sentence to death of appellant in the County Court of Kings County based on the fore-

going construction by said Court of Appeals of such statutes of the State of New York, and in its decision that so construed such statutes are valid and are not repugnant to the 14th Amendment of the Constitution of the United States.

Likewise, in accordance with said Rule 13 (9), appellant hereby designates as the parts of the record which he thinks necessary for the consideration of the foregoing points, those parts of the record specified in the attached stipulation by the parties hereto, designating portions of the record to be printed on appeal, which stipulation is made a part hereof.

Dated: March 23, 1949.

John F. Finerty, Attorney for Appellant-Defendant.

[fol. 1204] Service of the foregoing Statement of Points Upon Which Appellant Intends to Rely, together with the foregoing Designation of Parts of the Record To Be Printed On Appeal As Necessary For The Consideration Of Such Points, and Stipulation of Parties therein referred to, is hereby acknowledged.

March 23, 1949.

Miles F. McDonald, Attorney for Appellees-Plaintiffs.

[fol. 1205] Supreme Court of the United States

Stipulation by Parties Designating Portions of the Record to Be Printed on Appeal—Filed March 25, 1949

It is hereby stipulated by and between the undersigned counsel for the respective parties that the following portions of the Record on Appeal presented to the Court of Appeals of the State of New York be printed as necessary for the consideration of the appeal to the Supreme Court of the United States:

1. The indictment and the endorsements thereon appearing at folios 8 to 18 inclusive in Volume I. of the printed Case on Appeal submitted to the Court of Appeals of the State of New York, as shown at pages 3-6 of transcript of record on this appeal.

2. That portion of the trial court's charge to the jury appearing at folios 3477 to 3480 in the aforesaid

printed Case on Appeal, as shown at pages 1159-1160 of transcript of record on this appeal, reading as follows:

[fol. 1206] "If you find, gentlemen, that the defendant has been proven guilty of murder in the first degree beyond a reasonable doubt, then there is one other provision of the law to which your attention should be directed.

"Pursuant to the Penal Law of our State, a jury finding a person guilty of felony murder may, as part of its verdict, recommend that the defendant be imprisoned for the term of his natural life.

"Upon such recommendation, the Court may sentence a defendant to imprisonment for the term of his natural life, instead of sentencing him to electrocution. Under this section, you the jury, must determine first, whether the defendant is guilty of the crime charged; and, second, whether the sentence shall be death, or whether this Court may pronounce a sentence of life imprisonment. Both questions must be determined by you, and your answer to both questions must be contained in your verdict. Until you have agreed on every part of the verdict, you cannot render any verdict in this case. In other words, you must be unanimous before you render a verdict of guilt, and in addition thereto, as part of your verdict, if you find the defendant guilty you must reach a unanimous decision on the question as to whether or not there should be a recommendation of life imprisonment, to which I have just made reference.

"You must bear in mind that if you bring in a verdict of guilty as charged, without a recommendation, it means that the Court may impose a life sentence.

"You must also understand that in the event you find the defendant guilty and recommend life imprisonment, that the Court is not bound to accept your recommendation."

3. The verdict of the jury appearing at folios 3499 to 3500 inclusive in the aforesaid printed Case on [fol. 1207] Appeal, as shown at page 1167 of transcript of record on this appeal.

4. Proceedings on Sentence, appearing at folios *3505 to 3573* inclusive in the aforesaid printed Case on

Appeal, as shown pages 1169-1191 of transcript of record on this appeal.

5. The amended remittitur of the Court of Appeals of the State of New York, affirming the judgment of conviction of the County Court of Kings County and the sentence of death thereunder, as shown pages 1198-1200 of transcript of record on this appeal.

Dated: March 23, 1949.

John F. Finerty, Attorney for Appellant-Defendant,
Miles F. McDonald, District Attorney of Kings County, Attorney for Appellees-Plaintiffs.

[fol. 1208] SUPREME COURT OF THE UNITED STATES

No. 671

October Term, 1948

ORDER NOTING PROBABLE JURISDICTION—March 28, 1949

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is assigned for argument during the week of April 18th.

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Supreme Court of the United States

OCTOBER TERM, 1948

No. 671

SAMUEL TITTO WILLIAMS,
Appellant-Defendant,

vs.

THE PEOPLE OF THE STATE OF NEW YORK,
Appellees-Plaintiffs.

BRIEF FOR APPELLANT-DEFENDANT

EDWARD H. LEVINE,
JOHN F. FINERTY,
Counsel for Appellant,
120 Broadway,
New York 5, N. Y.

HERBERT M. LEVY,
ROBERT MARKEWICH,
of the New York Bar,
Of Counsel.

April 1, 1949.

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(1) Due process of law under the 14th Amendment includes as indispensable elements in a capital case, the right of a defendant to cross examine and rebut the testimony of witnesses against him, and to such confrontation as is necessary for those purposes.

(2) Since such rights are essential elements of due process of law under the 14th Amendment, a defendant in a capital case is entitled to be protected in them against *any agency* of the State authorized to deprive him of his life, and *at the point* at which such deprivation is authorized and undertaken.

(3) Where, as here, the statutes of a State authorize the trial judge in a capital case to disregard the jury's recommendation of a life sentence and to sentence an accused to death, such statutes must also require that the trial judge observe such rights *in connection with such sentence of death*, if such rights are to have any substantial meaning *at the only point* at which the State has, in fact, undertaken to deprive appellant of his life.

(4) The statutes of the State of New York, here involved, are therefore repugnant to the due process clause of the 14th Amendment, since the Court of Appeals of that State has construed such statutes

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as authorizing the trial judge, on sentence, to deprive appellant of his life on the basis of information obtained by the judge after verdict, from witnesses as to whom appellant was afforded no right of cross examination or rebuttal, nor the confrontation necessary for such purposes.

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Supreme Court of the United States

OCTOBER TERM, 1948

SAMUEL TITTO WILLIAMS, *Appellant-Defendant,* *vs.* THE PEOPLE OF THE STATE OF NEW YORK, *Appellees-Plaintiffs.*	No. 671

BRIEF FOR APPELLANT-DEFENDANT

TO THE HONORABLE THE SUPREME COURT OF THE UNITED STATES:

May it please the Court:

This is an appeal by the appellant-defendant, Samuel Titto Williams, from the judgment of the Court of Appeals of the State of New York of January 6, 1949, affirming the judgment of the County Court of Kings County, State of New York, of March 2, 1948, convicting said appellant of felony murder in the first degree and sentencing him to death.

On February 23, 1949, the Honorable Wiley Rutledge, Associate Justice of this Court, entered an order allowing appellant to appeal to this Court from said judgment, and a stay of execution pending the consideration and final determination of such appeal.

Opinions Below

There was no opinion by either the Court of Appeals or by the trial court, the County Court of Kings County.

The amended remittitur (R. 21-22) of the Court of Appeals to the County Court of Kings County affirming the judgment of conviction of that Court contains, however, the following recitals:

> "Judgment of conviction of the County Court, Kings County, appealed from in this action, be and is hereby in all things AFFIRMED.
>
> Upon this appeal there was presented and necessarily passed upon a question under the Constitution of the United States, viz: The defendant argued that, as construed, Sections 1044, 1045 and 1045A of the Penal Law and Section 482 of the Code of Criminal Procedure of this state violate the Fourteenth Amendment of the Constitution of the United States in that they sanctioned or permitted the sentence of death to be based upon information supplied by persons with whom the accused had not been confronted and as to whom he had no opportunity for cross-examination or rebuttal; this court held that neither the statutes nor the sentence aforesaid violated the Fourteenth Amendment of the Constitution of the United States."

Such amended remittitur is reported at 298 N. Y. 863.

Jurisdiction

This being an appeal from a judgment of the Court of Appeals, the highest court of the State of New York in which a decision could be had, in which Court there was drawn in question and necessarily passed upon the validity

of certain statutes of the State of New York, to wit, Sections 1044, 1045 and 1045-a of the Penal Laws of the State of New York and Section 482 of the Code of Criminal Procedure of the State of New York, as allegedly repugnant to the 14th Amendment to the Constitution of the United States, and the decision of said Court being in favor of the validity of such statutes, the jurisdiction of this Court is invoked under Section 1257(2), Title 28, U. S. C.

The statutes of the State of New York, the validity of which are so involved on this appeal, are set out as Appendix A to this brief.

Statement of the Case

In this case the Court of Appeals of the State of New York construed the statutes of that State, hereinbefore specified, as permitting the trial judge in the County Court of Kings County, New York, before whom and a jury of said court appellant was tried and convicted of felony murder in the first degree, to disregard the jury's recommendation of life imprisonment and to sentence appellant to death on certain grounds specifically stated by the trial judge. These grounds appear verbatim in the transcript of record on this appeal to this Court (R. 12-20), and are there indexed under the designation "Proceedings on Sentence." The more pertinent portions will presently be quoted in this Statement of the Case. It seems advisable, however, first to set out briefly their general nature.

As appears from such portion of the record, the trial judge avowedly disregarded the jury's recommendation of life imprisonment and sentenced appellant to death on the basis of information received by such judge in the absence

both of appellant and of his counsel, from probation reports and from *ex parte* statements of probation officers and other persons to said judge, which information he expressly states could not legally have been presented in evidence before the jury, and some of which he himself had excluded when offered before the jury by the State.

Such information, as there shown, includes accusations, based on hearsay unsworn statements of various persons with whom appellant was not confronted and as to whom he was afforded no opportunity for cross examination or rebuttal, that appellant had been guilty of other crimes. None of such alleged crimes, it is particularly to be noted, would constitute capital offenses, and, therefore, even had appellant in fact been convicted of any of them, he could not have been subjected to the penalty of death for the commission of any of them. There is not a word of evidence, however, either before the judge or before the jury, that appellant had ever been convicted of any such alleged crimes. Moreover, there is no evidence to contradict the only information in the record in this respect (R. 2), that appellant had never been convicted of any crime.

As there further appears, the Judge stated his belief that had it been legally possible to permit the information, thus received by him *ex parte*, to be presented to the jury, the jury would not have made its recommendation of life imprisonment, and that on such basis, and on the basis of the judge's own conclusion that the appellant had been guilty of such alleged other crimes, the judge undertook to disregard the jury's recommendation and to sentence appellant to death.

The following are verbatim excerpts from the statements made by the trial judge on sentence as to the un-

sworn information received by him *ex parte*, which information he specifically recognizes was not admissible before the jury, but on the basis of which he avowedly disregarded the jury's recommendation of life imprisonment and sentenced the appellant to death. In order to indicate the pertinence attributed by the judge to such information, it has been necessary to include brief excerpts of certain other matters referred to by the judge, which are, in part at least, based on evidence of record before the jury. In order to indicate such matters as are, in any degree, based on evidence so of record, the excerpts referring to them have been placed in brackets. All other matters excerpted are based wholly on information obtained *ex parte* by the judge.

Excerpts from Statements made by Trial Judge at Time of Sentence (R. 12-20).

"The Court: The Defendant, Samuel T. Williams, also known as Tito Williams, was convicted of Murder in the First Degree, with a recommendation of life imprisonment, on January 22, 1948. (R. 12)

Counsel have moved to set aside the verdict of the jury as against the weight of the evidence, and for other reasons urged by them. They have also requested the Court to accept the recommendation of the jury in the event the motion is denied. (R. 12)

* * *

Many material facts concerning the defendant's background could not, because of the rules of evidence, be brought to the attention of the jury, which heard the testimony involving the murder of Selma Graff. (R. 12-13)

I believe it is important to consider some of the evidence, in the light of facts brought to the attention of the Court as the result of investigation by our Probation Department,

and through other sources, for the purpose of considering the jury's recommendation. (R. 13)

[The defendant has been found guilty of striking and killing Selma Graff with an iron bar in the course of burglarizing the ground-floor apartment at 143 East 96th Street, Brooklyn, New York, where she resided with her widowed mother and her young brother, Donald, who is nine and a half years of age.] (R. 13)

* * *

The defendant's entrance into the Graff home was the result of experience he had had on thirty other burglaries in and about the same vicinity for a period of about two months prior to the murder of Selma Graff. He was well schooled in entering homes for the purpose of burglaries, and despite his youth, was a veteran at this type of crime. It was only due to excellent policework coupled with force of circumstances which finally led to his apprehension. In fact, when he was apprehended, no one had any thought that he was in any way connected with the Selma Graff killing. The police were on the look-out for a "night burglar" who had committed approximately thirty burglaries in that vicinity over a period of two months. Seventy-five detectives had been assigned just for the purpose of apprehending the person or persons involved, and it was their impression, based on the manner in which each of the burglaries had been committed, and the fact that a ground-floor apartment was involved in each instance, that in apprehending the person involved in one of these burglaries, they would in all probability have the one who had committed all of them. (R. 14-15)

[Sometime during the early morning hours of September 8, 1947, as a result of information that a prowler was in the vicinity, various detectives and radio patrol cars converged toward a central point at one of the streets in Brownsville and practically ringed that area with radio patrol cars and plain-clothesmen. They arrived within two

minutes after receipt of this information. Detective Cullen saw the defendant emerging from a cellar areaway] and when he approached him and asked him what he had been doing there, the defendant said he had been urinating. Upon examination, no such evidence was found, and the suspicions of the police were sufficiently aroused to take the defendant into custody. [He was taken to the place where he was residing] and there the police officials found about eighteen pawn tickets and personal property which had been reported stolen by various individuals in that vicinity. (R. 15)

[He was then taken to the 73rd Precinct and questioned about these burglaries.] During that interval, individuals who had filed complaints with the police were brought to the Precinct and either identified some of the property which had been found in the defendant's room, or actually identified the defendant. (R. 15)

* * *

[He claimed that police brutality had forced these confessions from him and as evidence of that, exhibited certain scars on his elbow, testifying that these had been caused by blows of the butts of guns held by detectives and from cigarette burns.] (R. 16)

It is interesting to note that the medical chart obtained from the United States Navy, *which information was not permitted into evidence,* discloses that at the time of defendant's discharge, which was before the date of this crime, he had a one-inch scar on the left forearm near the elbow as well as other scars. This chart would therefore indicate that the defendant had this and other scars before he even committed the instant crime, and his testimony concerning police brutality, as well as other testimony, which he glibly stated on the witness stand to be the truth was in fact made up from the whole cloth, and was merely used by him in an attempt to hoodwink the jury. (R. 16)

The probation report indicates that the defendant is a psychopathic liar and his personality is permeated with psychosexual habits of thought and conduct. According to the testimony of the defendant, he was a boarder of Miss Yvonne Ah Lum and only paid one week's board. The rest of the time he was kept by Mrs. Ah Lum and Miss Davenport, the woman who lived with Mrs. Ah Lum. He further stated to police that on various occasions he brought different men into the apartment for the purpose of having sexual relations with these two women. (R. 16)

There was information from Detective Werner that while the defendant was in the uniform of the United States Navy, he observed him using a camera at one of the public schools in the Brownsville area, to take photographs of private parts of young children. (R. 16)

We have the case of Rose Spector whose apartment was burglarized by the defendant on August 27, 1947, at about two a.m., and who identified one of the watches found in the defendant's room by the detectives at the time he was apprehended, as a watch that had been stolen from her apartment on that date. She says that she was awakened by someone pulling the bedsheet from under her and flashing a flashlight in her face, and when the defendant saw that she had been awakened, he ran away. *The defendant stole a wristwatch and a wallet containing some money from her apartment, and admitted this crime to the detectives. He also showed the police where he had discarded the wallet which was recovered. Miss Spector positively identified the defendant as the one in her apartment at two a.m. on August* 27, 1947. (R. 16-17)

We also have the situation involving the Goldiner family who resided in the ground-floor apartment at 145 Legion Street, about two weeks before his arrest, at about two a.m. At that time, their seven-year-old daughter was asleep alone in a rear room, the parents being in another room. *The child says that she was awakened when she felt someone twisting her feet. She says that the lower part of her pajamas had been taken off and the defendant placed himself*

on top of her and placed his penis between her legs. He had one of his hands over her mouth to prevent her from making any outcry. He then arose, and as he was buttoning his pants, she made an outcry which frightened the defendant, who ran out of the apartment. The mother of the child says that she found evidence of discharge on the bed of the child. *The child also positively identified the defendant as the one who perpetrated this act.* (R. 17)

The gross proceeds of the many burglaries committed by the defendant total approximately $5,000. In his room at 122 Sutter Avenue, stolen property was found, as I have indicated before, including fifteen ladies' and men's rings, three ladies' wrist-watches, one man's wrist-watch, about eighteen pawn tickets, three coin banks, which had been forced open, pornographic pictures, and a large hunting knife. Some of the pawn tickets were in the defendant's name and others were in the name of one Alberta Davenport, who lived at the same premises and who said that the defendant had given her the property to pawn. The defendant claimed that all of the stolen property found in his room was either won by him in crap games or bought by him from different men unknown to him, for various sums of money. (R. 17).

There is no point in continuing any further into the defendant's background and experience as a full-time burglar. He perfected what he thought was a foolproof method of earning a living in an easy way. Like others of this kind, however, he finally found himself in a situation not to his liking, and decided to destroy whatever was in his way to a continued success in the criminal career chosen by him. It is unfortunate that his path was blocked by this young girl who showed such bravery, in the protection of her life. There was no reason for the wanton destruction of the life of this young girl. (R. 17-18)

* * *

The defendant, when he testified, showed himself to be a glib, slick, calculating type of individual. His ideas, as

revealed by our probation report, revolve around a morbid sexuality, and he is emotionally unstable, unconcerned and suffers from no remorse whatsoever. *He is deemed by our probation department to be a menace to society.* (R. 18)

It is unfortunate in a trial in this nature that the jury, once it has decided upon a verdict of guilty of murder in the first degree, is not permitted to receive other evidence, which although not permissible as legal evidence in the trial itself, could be used by it in determining whether or not it would recommend life imprisonment. The Court is convinced that the defendant's glibness did help him to the extent of obtaining a recommendation from the jury, *and had they been fully cognizant of all the facts, there would have been no such recommendation.* (R. 18)

I have given this matter grave and serious consideration and have searched for any facts which would justify the acceptance of the jury's recommendation. *My purpose in revealing the defendant's background was to indicate some of the facts which the Court has taken into consideration, in weighing the recommendation of the jury.* I regret that I found nothing in his favor and my conscience would not permit me to give him any consideration of this nature. *The record of the defendant stamps him as a dangerous criminal and I find no basis whatsoever on which I can extend to him, in good conscience, the consideration which the jury has recommended.* To adopt such a recommendation would be tantamount to a challenge to law and order in our community. (R. 18-19)

The People of the State should not be burdened with the responsibility of taking care of this defendant for the remainder of his natural life, and he deserves no merciful consideration by the Court. He must pay the extreme penalty for his brutal murder of an innocent young girl and the injuries he inflicted upon her young brother. The grief which the defendant's acts brought, not only upon the family of the deceased, but upon his own family, is appalling beyond description. (R. 19)

Whether or not a Court should follow the recommendation of a jury in a case of this kind is by no means an easy matter to determine. There are many factors that enter into the resolution of the problem thus presented. I have given everyone of those factors its proper weight and due consideration, and it is only after such careful weighing and deliberation that I have come to the conclusion that this is an instance in which the best interests of society would not be served by following the recommendation of the jury. *If, indeed, this defendant is, in the language of our Probation Department,* a "menace" to our society, *and I believe that he is* such a menace, *it is the duty of the Court to consider the recommendation of the jury in the light of that fact and the various other facts* brought to the attention of the Court *for the first time. Many of these facts—indeed the greater portion of them—while extremely relevant on this question, were not relevant to the issue tried before the jury.* For that reason, undoubtedly, the jury made the recommendation that it did. *I am fully convinced, however, that if this jury had before it the facts contained in the probation report, the recommendation would never have been made. It would stultify my conscience to adopt the recommendation under such circumstances.* It is not without hesitation that I have reached this conclusion, but having reached it, I am now convinced of its absolute justice and inevitably. (R. 19-20)

I must therefore deny the motion to set aside the verdict and to refuse to accept the recommendation of the jury for life imprisonment as embodied in its verdict." (R. 20) (italics supplied)

The foregoing statements by the trial judge, himself, show:

(1) That the trial judge implicitly recognized that the evidence before the jury warranted the jury in recommend-

ing that appellant be sentenced to life imprisonment, instead of death.

(2) That the grounds upon which the trial judge expressly states that he felt compelled to disregard the jury's recommendation and to sentence appellant to death, are based solely on information, obtained by him ex parte, *concerning matters, evidence of which he expressly recognized, was inadmissible before the jury.*

(3) That, therefore, the trial judge undertook to deprive appellant of his life, on sentence, on the basis of information received by him ex parte *after verdict, concerning matters concededly inadmissible before the jury, although the trial judge implicitly recognizes that the jury was justified, on verdict, in refusing to deprive appellant of his life, and in recommending that he be sentenced to life imprisonment, on the basis of evidence before the jury as to which appellant had been afforded the right of cross-examination and rebuttal.*

(4) It seems, therefore, undeniable that the State of New York has by statute here undertaken to deprive appellant of his life, solely on the basis of information obtained by the trial judge after verdict, from witnesses as to whom appellant had been afforded no right of cross-examination or rebuttal, nor any such confrontation as would be essential for such purposes.

Specification of Assigned Errors Intended to be Urged

1. The said Court of Appeals erred in its decision that the statutes of the State of New York, hereinbefore specified, construed by the said Court of Appeals to permit the

Trial Judge to disregard the jury's recommendation of a life sentence and to sentence defendant to death, on the basis of evidence of witnesses with whom accused has not been confronted, and as to whom accused has been afforded no opportunity for cross-examination or rebuttal, are valid and are not repugnant to the 14th Amendment to the Constitution of the United States.

2. The said Court of Appeals erred in failing to decide that such statutes are invalid and repugnant to the 14th Amendment to the Constitution of the United States, unless construed to limit the right of the Trial Judge to disregard the jury's recommendation of a life sentence and to sentence defendant to death, either on the basis of evidence already of record at the time of the jury's verdict, or if on the basis of evidence subsequent to the jury's verdict, only where accused is confronted before the Trial Judge with witnesses giving such testimony and is afforded opportunity for cross-examination and rebuttal.

3. The said Court of Appeals erred in affirming the judgment of conviction and sentence to death of defendant in the County Court of Kings County, based on the foregoing construction by the said Court of Appeals of such statutes of the State of New York, and in its decision that, so construed, such statutes, and sentence under them, are valid and not repugnant to the 14th Amendment to the Constitution of the United States.

Summary of Argument

Argument for appellant will be directed primarily to the following propositions:

1. That the statutes of the State of New York here involved, in undertaking to authorize a trial judge in a felony murder case, to disregard the jury's recommendation of life imprisonment and to sentence appellant to death, on the basis of information supplied by persons as to whom appellant had been afforded no opportunity for cross-examination or rebuttal, and with whom he had not been confronted even to the limited extent necessary for such purposes, are repugnant to the express provisions of the 14th Amendment to the Constitution of the United States that

> "* * * nor shall any State deprive any person of life * * * without due process of law."*

2. That for this Court so to hold will not conflict with anything *in the majority opinions* in the cases of *Adamson* v. *California*[1], *Palko* v. *Connecticut*[2], *Twining* v. *New Jersey*[3], *Maxwell* v. *Dow*[4], *Boyd* v. *United States*[5], *Hurtado* v. *California*[6], *Walker* v. *Sauvinet*[7], or the *Slaughter House Cases*[8].

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*This does not involve any contention that such statutes may not validly give the trial Judge, as they have been construed to do in *People* v. *Cole*, 285 N. Y. 838, discretion to disregard the jury's recommendation of a life sentence and to sentence an accused to death, where such discretion is exercised on the basis of evidence received before verdict, and as to which accused has been accorded both the right of cross-examination and rebuttal.

[1]332 U. S. 46.
[2]302 U. S. 319.
[3]211 U. S. 78.
[4]176 U. S. 581.
[5]116 U. S. 616.
[6]110 U. S. 516.
[7]92 U. S. 90.
[8]16 Wall. 36.

3. That, on the contrary, *consistently with the very bases of the majority opinions in the cases cited*, the statutes of the State of New York here involved, should be held repugnant to the due process clause of the 14th Amendment.

4. That, *consistently with the majority opinions* in the cases cited, the statutes of the State of New York here involved, should be held further repugnant to the 14th Amendment, as abridging appellant's privileges and immunities as a citizen of the United States.

5. That to hold that the probation provisions of the statutes of the State of New York here involved are repugnant to the due process clause of the 14th Amendment, when applied, as here, to a *capital sentence*, is not necessarily to hold that such provisions would be so repugnant when applied to a *non-capital sentence*, but that even should the first holding necessarily involve the second, this would not warrant this Court in refusing to recognize the invalidity of such State statutes where, as here, applied to a capital sentence.

Reply to Suggestions Made by Certain Members of the Court on Application for Stay of Execution

At the time counsel made application to individual members of the Court for leave to appeal and for stay of execution in these proceedings, he was met by two principal objections:

First: It was said that under the majority opinion of the Court in *Adamson* v. *California*, 332 U. S. 46, the statutes of the State of New York could not be held re-

pugnant either to the "privileges and immunities" clause, or to the "due process" clause, of the 14th Amendment.

Second; It was said that to hold, in this case, that the probation provisions of the statutes of New York, here involved, are repugnant to the 14th Amendment, would be to invalidate not only such provisions of the New York statutes, but all State and Federal statutes making similar provisions.

Counsel for appellant desire to reply to these suggestions as a preliminary to the basic Argument of appellant's case. Such reply will inevitably involve some discussion of certain propositions likewise germane to such basic Argument.

A. *The Statutes of New York, Here Involved, Are Repugnant to the 14th Amendment Even Under the Majority Opinions in* Adamson *v.* California, *332 U. S. 46, and the Prior Majority Opinions There Relied On.*

I

Assuming that the term, "due process of law", as used in the 14th Amendment, includes the right of an accused in a criminal case to cross-examination and rebuttal of witnesses against him, and to such limited confrontation as is necessary for these purposes,* a State may not, by statute, authorize a judge on sentence, any more than a jury on verdict, to deprive an accused of his life on the basis of evidence as to which an accused has been afforded no such right of due process.

*The validity of this assumption will later be shown in the Argument, herein, pp. 31 et seq.

II

An accused is entitled, under the 14th Amendment, to be protected against deprivation of life without due process of law by *any agency of a State*[9]. Obviously a trial judge in a State court constitutes an agency of the State.

III

An accused is entitled, under the 14th Amendment, to be protected against deprivation of life without due process of law, *at every stage of judicial proceedings*,[10] including the constitution of the court,[11] the trial before a jury,[12] *the sentencing by a judge*,[13] and the action of an appellate court.[14]

IV

An accused is particularly entitled to such protection at the point in judicial proceedings where the deprivation of life actually takes place. There can be no question that in this case such point was in the proceedings by the trial judge on sentence, since while the verdict of the jury found the appellant guilty, that very verdict expressly refused to deprive the appellant of his life.

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[9] *Buchalter* v. *New York*, 319 U. S. 427, 429; *Brown* v. *Mississippi*, 297 U. S. 278, 286; *Mooney* v. *Holohan*, 294 U. S. 103, 112, 113; *Hebert* v. *Louisiana*, 272 U. S. 312, 316.

[10] *Adamson* v. *California* (Frankfurter, J.), 332 U. S. 46, 67, 68; *Morgan* v. *U. S.*, 304 U. S. 1, 19, 20; *Frank* v. *Mangum*, 237 U. S. 309, 331, 332.

[11] *Tumey* v. *Ohio*, 273 U. S. 510.

[12] *Moore* v. *Dempsey*, 261 U. S. 86.

[13] *Townsend* v. *Burke*, 334 U. S. 736, 740, 741.

[14] *Cole* v. *Arkansas*, 333 U. S. 196, 201, 202.

V

In view of the clear and repeated intimations in majority decisions of this Court that the right of trial by jury is neither a privilege nor immunity of a citizen of the United States, nor an essential part of due process of law under the 14th Amendment, and that therefore a state may by statute abolish trial by jury,[15] the right of an accused to be protected against deprivation of life without due process of law, in connection with a sentence by a judge, becomes of peculiar importance in a state court.

VI

There is nothing in the foregoing grounds upon which appellant claims that the statutes here involved would deprive appellant of his life both without due process of law and in violation of his privileges and immunities as a citizen of the United States, within the meaning of the 14th Amendment, which is in conflict with the meaning attributed to either of those terms in the majority decisions of this Court heretofore specified.

VII

Collectively, such majority decisions of this Court taken at their strongest hold:

(1) That the term "due process of law" as used in the 14th Amendment, has essentially the same meaning as when used in the 5th Amendment, and that in both amendments it must be construed to exclude, or at

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[15] *Palko* v. *Connecticut*, 302 U. S. 319, 324, 325; *Maxwell* v. *Dow*, 176 U. S. 581, 602, 603; *Walker* v. *Sauvinet*, 92 U. S. 90, 92, 93; *Hurtado* v. *California*, 110 U. S. 516, 533.

least not to include as such, the other specific rights enumerated in the first 8 Amendments, including the 5th Amendment itself, since otherwise that term would be mere "surplusage".[16]

(2) That the specific rights enumerated in the first eight Amendments do not, as such, constitute the privileges and immunities of citizens of the United States within the meaning of the 14th Amendment, because those rights are not by the terms of the first eight Amendments confined to citizens of the United States but extend to *all persons*, whether citizens of the United States or not.[17]

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[16] *Adamson* v. *California*, 332 U. S. 46, pp. 53, 54, 66, 67; *Palko* v. *Connecticut*, 302 U. S. 319, 323; *Twining* v. *New Jersey*, 211 U. S. 78, 100, 101; *Hurtado* v. *California*, 110 U. S. 516, 534, 535.

The doctrine that the term "due process of law", would be mere surplusage unless construed to exclude those specific rights enumerated in the 5th Amendment and in others of the first 8 Amendments, seems first to have been enunciated by Mr. Justice Matthews in the *Hurtado* case, p. 534. See also Mr. Justice Frankfurter in the *Adamson* case, pp. 66-67. Counsel submit, however, that by construing the term "due process of law", both in the 5th and 14th Amendments, as including *as minima* those rights specified in the first 8 Amendments, and *as extending in addition* to such new rights as developing social and political concepts may come to recognize, would make that term neither "superfluous", as suggested by Mr. Justice Matthews, nor "mere shorthand", as suggested by Mr. Justice Frankfurter.

[17] *Maxwell* v. *Dow*, 176 U. S. 581, 595, 596.

The reasoning in the *Maxwell* case in this respect would seem to be inverted. It would seem that the rights enumerated in the first eight Amendments were recognized to be so fundamental that they should be extended to *all persons*, citizens or not. To conclude, as does the *Maxwell* case, that by extending them to *all persons*, it was intended to exclude them as privileges or immunities of citizens of the United States, would seem essentially to confine the privileges or immunities of citizens of the United States to such rights as are not so fundamental as to require their extension to all persons.

VIII

Since the right of an accused to cross examine and rebut the testimony of witnesses against him is not a right specifically enumerated in any of the first eight amendments, it is not therefore, even under the most extreme interpretation of the doctrine of such majority decisions, a right excluded from the meaning of the term "due process of law", as used either in the 5th or the 14th Amendments.

IX

Moreover, the right of an accused to be confronted by witnesses against him, at least to the limited extent essential to the effective exercise of the right of cross-examination and rebuttal, is not necessarily synonymous or co-extensive with the right of confrontation specifically conferred on *all persons by the 6th Amendment. Therefore despite the enumeration of the possibly broader right in the 6th Amendment, such limited right of confrontation might, consistently with the foregoing doctrine of such majority decisions, be within the meaning of "privileges or immunities of citizens of the United States" as used in the 14th Amendment.**

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*It is to be noted that Wigmore on Evidence, Volume V, § 1397 (Third Edition) seems to consider the right of cross-examination as constituting the full privilege of confrontation conferred by the 6th Amendment. However, see § 1367 and § 1365, *idem*, quoted, *post.*, pp. 39, 40.

It is particularly to be noted that appellant here does not primarily rest his case on the right of confrontation as a privilege or immunity of citizens of the United States under the 14th Amendment, but rather on the right of cross-examination and rebuttal of witnesses against him as an essential part of due process of law under that Amendment.

X

Such majority opinions of this Court, however, do not in reality hold that the fact that certain rights are specifically enumerated in the first eight amendments inevitably precludes them from inclusion within the term "due process of law" as used in the 14th Amendment. In this respect such majority opinions distinguish between, and enumerate, such rights as are "so rooted in the traditions and conscience of our people as to be ranked as fundamental", and those which are not.[18]

It is particularly to be noted, in this respect, that in *Twining* v. *New Jersey*, 211 U. S. 78, 113, this Court says:

> "Salutary as the principle (the right against self-incrimination) may seem to the great majority, *it cannot be ranked with the right to hearing before condemnation* * * *." (italics and matter in parenthesis supplied)

B. *To Hold That the Probation Provisions of the Statutes of New York, Here Involved, Are Repugnant to the 14th Amendment When Applied to Deprivation of Life, Will Not Necessarily Invalidate Such Provisions If Confined to the Proper Scope of Probation Laws, the Deprivation of Liberty.*

Moreover, Such Probation Provisions Are Susceptible of a Practicable Construction, Consistent with Due Process of Law, Even Though Applied to Deprivation of Life as Well as of Liberty.

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[18] *Palko* v. *Connecticut*, 302 U. S. 319, 323-326; *Powell* v. *Alabama*, 287 U. S. 45, 65-68; *Twining* v. *New Jersey*, 211 U. S. 78, 99.

I

The proper scope of probation statutes is concerned with deprivation of liberty and not of life, and such statutes, moreover, are in their essence ameliotory. While the 14th Amendment provides that no person shall be deprived of either life or liberty without due process of law, in practical application the effect of the prohibition differs as between deprivation of life and deprivation of liberty.

II

In non-capital cases the function of a jury is ordinarily confined to the determination of guilt or innocence, and seldom, if ever, is concerned with the degree of punishment. In such cases the length of sentence lies entirely within the discretion of the judge, subject to such statutory limits as may be provided. While in such cases a judge may act on the basis of information obtained *ex parte* from probation reports or other sources, he seldom, if ever, discloses whether the sentence imposed is greater or less because of such information. In the absence of any statement to the contrary, since the purpose of probation statutes is ameliotory, the reasonable presumption is that the information so obtained has resulted in amelioration rather than aggravation of the sentence.

III

If in a particular instance, however, a trial judge in a non-capital case should expressly state that, had it not been for such *ex parte* information, he would have imposed a shorter sentence, the use of such *ex parte* information still *would not be the basis for depriving the accused of*

his liberty, since the jury's verdict of guilt, in itself, under any law, would presumably afford basis for some deprivation of liberty. Such *ex parte* information would be at most, therefore, the basis merely *for a greater degree of deprivation of liberty*, and conceivably, as such, might well be held not to come within the *literal* prohibition of the due process clause of the 14th Amendment. Even were it held otherwise, however, the use of such *ex parte* information, it would seem, would not necessarily invalidate the conviction, though it would invalidate the sentence.

IV

In a capital case, however, there obviously can be no degrees of deprivation of life—a man is deprived of his life or he isn't. Here, therefore, is no mere case of a trial judge simply imposing *a greater degree of punishment* based upon information obtained *ex parte*. It is a case where a judge on the basis of information obtained *ex parte* has imposed a *fundamentally different character of punishment* than the jury found, and the judge concedes, would have been justified by the evidence of witnesses before the jury, as to whom appellant had been afforded the right of cross-examination and rebuttal. It is therefore a case in which the appellant, under the authority of the statutes of the State of New York, as construed by the Court of Appeals of that State, would be deprived of his life contrary to the *literal* provisions of the 14th Amendment, unless it here be held that cross examination and rebuttal of witnesses furnishing the information on which alone such deprivation is concededly based, is no part of due process of law under that Amendment.

V

This Court is of course bound by the construction placed by the Court of Appeals of the State of New York on the statutes of that State here in question, including the probation provisions of those statutes embodied in Section 482 of the Code of Criminal Procedure of that State. This Court, however, might well point out to the Court of Appeals that if such probation provisions, as now construed, be held repugnant to the 14th Amendment when applied to capital cases, their constitutionality can be preserved as to non-capital cases by the more limited constructions here suggested under (1), and even as to capital cases, by that suggested under (2), *infra*.

(1) By confining the application of such probation provisions to what would seem the proper scope of probation laws, the regulation of deprivation of liberty. In such case, as already pointed out, such provisions would not necessarily be repugnant at least to the literal provisions of the 14th Amendment.

(2) If such probation provisions, however, must be construed to extend to deprivation of life, they can be still construed consistently with the provisions of the 14th Amendment, by requiring the judge in using the information which he is required or permitted to consider as a basis of sentence, to give the accused notice that such use is to be made, and a fair hearing in connection therewith,[19] i.e., the right to cross examine any witness furnishing such information and to offer evi-

[19] *Cf. Fleenor* v. *Hammond*, 116 Fed. (2d) 982. See also Assignment of Error No. 2, *ante*, p. 13.

dence in rebuttal, not only of such witness, but of probation records, etc.

VI

The Court might well point out, also, that in fact no choice need necessarily be presented between preserving the constitutional rights of an accused under the 14th Amendment and destroying the effectiveness of the New York probation statute.* That, however, if such choice were presented, there necessarily could be but one answer to it—that is, that constitutional rights must be superior to effective probation regulations.

VII

The State statutes here involved are clearly distinguishable from the so-called "repeated offender" statutes, the validity of which have been upheld by this Court in,

*The provisions of Section 482 of the Code of Criminal Procedure of the State of New York, here involved, read in this respect as follows:

> "Before rendering judgment or pronouncing sentence the court shall cause the defendant's previous criminal record to be submitted to it, including any reports that may have been made as a result of a mental, psychiatric or physical examination of such person, and may seek any information that will aid the court in determining the proper treatment of such defendant."

It is to be noted that while the judge *is required* before pronouncing sentence to have submitted to him any reports that may have been made as a result of mental, psychiatric or physical examination of defendant, and *is permitted* to use any information which will aid the court in determining the proper treatment of the defendant, *there is nothing in the statute itself which requires* that this be done *ex parte*, although the Court of Appeals has construed the statute as so *permitting*.

among other cases, *McDonald* v. *Massachusetts*, 180 U. S. 311; *Graham* v. *West Virginia*, 224 U. S. 616; and *Carlesi* v. *New York*, 233 U. S. 51. The validity of such "repeated offender" statutes, as there shown, rests on the actual existence and proof of prior convictions. Here the record shows (R. 2), without contradiction, that appellant had never been previously convicted of any crime. Moreover, that none of the alleged prior crimes of which the trial judge, on the basis of *ex parte* accusations, avowedly concluded appellant was guilty and avowedly, on the basis of such conclusion, sentenced appellant to death, were such that, had the appellant been convicted of any of them, he would have been subject to capital punishment. (R. 15-20)

VIII

Finally, it is to be pointed out that the logic of the upholding by this Court of the New York statutes here involved as not repugnant to the 14th Amendment to the Constitution of the United States, would be to hold that any person in the United States, citizen or not, may, without denial of due process of law, be deprived of his life by a judge on the evidence of witnesses with whom such person has not been confronted and as to whom he has been afforded no right of cross-examination or rebuttal, even though a jury has refused to deprive the same person of his life on the basis of evidence of witnesses with whom he has been confronted and as to whom he has been afforded the right of cross-examination and rebuttal.

It is particularly to be pointed out that if this may be authorized by State statute in any State court without contravening the due process clause of the 14th Amendment, it follows that this may be authorized by a Federal

statute in any Federal court without contravening the due process clause of the 5th Amendment.*

Argument

Here this brief will discuss those matters which counsel for appellant conceive to be basic to appellant's case. As already noted, certain of these matters have been discussed to some extent under the foregoing "Reply to Suggestions of Members of the Court, etc.". As a preliminary to further consideration of such matters, and to consideration of others not there discussed, it is desired to call the Court's attention respectfully to the following:

First: The broad question here presented is whether, consistently with the 14th Amendment, a State may deprive any person of his life, through *any agency of the State at any point in judicial proceedings;* on the evidence of witnesses as to whom such person has been afforded no right of cross examination or rebuttal, or even such limited confrontation as is essential for those purposes. The particular question here, is whether the State of New York

*It is of course true, as shown by the opinion of Mr. Justice Frankfurter, in *Andres* v. *United States* (333 U. S. 740, 754), that unlike the statutes of New York, the present Federal statutes, and those of many states, make the jury's recommendation of life imprisonment, in connection with an otherwise capital offense, mandatory upon the Judge. It is further to be noted that it is there assumed that this is the proper construction of the New York statutes here involved. As already noted, however, the Court of Appeals of New York in the case of *People* v. *Cole*, 285 N. Y. 838, has construed the statutes of that State as not making the jury's recommendation mandatory upon the judge. The point is that those Federal and state statutes which now do make the jury's recommendation mandatory may, of course, be modified in this respect.

can do so by undertaking by statute to confer such power on the judge of the court before whom such person is tried, as an incident to determining sentence. It may be conceded that if a State can do this *through any agency* or at *any point during judicial proceedings*, it can do as the State of New York has here undertaken to do.*

Second: It would seem undeniable that both the basic and the particular questions thus presented are substantial

---

*Here, perhaps, is as good a place as any to dispose of two contentions which otherwise might be made by the appellees:

(1) That had the trial Judge in the case at bar in fact based his disregard of the jury's recommendation of life imprisonment and sentenced appellant to death, in exactly the same manner and on exactly the same *ex parte* information as he avowedly here did, *but had omitted such avowals and made no such disclosure of the basis upon which he undertook to deprive appellant of his life*, there could have been no contention here that thereby appellant would be deprived of his life without due process of law under the 14th Amendment to the Constitution of the United States. The obvious answer is that, while under such circumstances the contention might still have been made, it could not have been proved, while here it not only can be made, but can be and is proved.

(2) That, as shown by the "Proceedings On Sentence" (R. 4-20), both appellant and his counsel were present when the trial judge detailed the manner in which he had obtained such *ex parte* information, and avowed it to be the basis upon which he undertook to disregard the jury's recommendation of life imprisonment and to sentence appellant to death. That, nevertheless, neither appellant nor his counsel made any objection, or any demand for the right to cross-examine the witnesses from whom such information had been obtained, or to rebut either their testimony or the record evidence furnished by probation reports, etc. Again, the answer is obvious. Any such objection or demand would have been futile, since the trial judge, in so acting, did exactly what the Court of Appeals has expressly construed the statutes of the State of New York as authorizing him to do.

ones. No better authority for this could be invoked than what has already been quoted from the majority decision in *Twining* v. *New Jersey*, 211 U. S. 78, 113, and which is here repeated. There, the majority said:

> "Salutary as the principle (the right against self-incrimination) may seem to the great majority, *it cannot be ranked with the right to hearing before condemnation* * * *." (Italics and matter in parenthesis supplied.)

Had the majority, not only in the *Twining* case, but in *Adamson* v. *California*, 332 U. S. 46, confined their decision to what would seem to have been the more limited constitutional question necessarily presented in those cases, instead of undertaking to decide the broader constitutional question actually passed upon, the force of the foregoing quotation from the *Twining* case would have been even greater.

That more limited question was whether State statutes authorizing a judge and prosecutor to comment upon, and a jury to consider, the failure of a defendant in a criminal case to take the stand, are necessarily equivalent to compelling self incrimination, and, even if not, whether they nevertheless constitute a denial of due process of law under the 14th Amendment.

In the *Twining* case, the only question necessarily presented was the validity under the 14th Amendment to the Constitution of the United States, of a state statute which permitted a judge to comment, in his instructions to the jury, on the failure of a defendant to take the stand. There the judge expressly cautioned the jury that while such failure might be considered, it could not be taken as necessarily an admission of guilt (pp. 82, 83).

In the *Adamson* case, the appellant was convicted of a charge of first degree murder on an information which included charges of former convictions for burglary, larceny, and robbery, which former convictions his answer admitted. Both the Constitution and the Criminal Code of California expressly provide that no defendant in a criminal action may be compelled to be a witness against himself. (See footnote pp. 48, 49 of *Adamson* case). As there appears the Constitution, however, provided that:

> "* * * in any criminal case, whether the defendant testifies or not, his failure to explain or to deny by his testimony any evidence or facts in the case against him may be commented upon by the Court and by counsel, and may be considered by the Court and by the jury * * *".

As also there appears the Penal Code provided that if a defendant in a criminal case,

> "* * * offers himself as a witness, he may be cross-examined by the counsel for the people as to all matters about which he was examined in chief. The failure of the defendant to explain or to deny by his testimony any evidence or facts in the case against him may be commented upon by counsel."

The majority opinion (pp. 50, 51) obviously assumes that such statutory provisions amount to a requirement of self-incrimination. This assumption, it is respectfully submitted, seems unjustified. It may very well be, as both the concurring opinion of Mr. Justice Frankfurter (pp. 60, 61) and the dissenting opinion of Mr. Justice Murphy (p. 124), concurred in by Mr. Justice Rutledge, point out, that these statutes faced the defendant in that case with the dilemma of

taking the stand and subjecting himself to cross-examination as to his prior convictions, or of failing to take the stand and subjecting himself to comment by the judge and the prosecutor, and to consideration by the jury, of his failure to do so, as evidence of guilt. As pointed out, however, by Mr. Justice Black in his dissenting opinion (pp. 68, 69) such right of comment by the judge and the prosecutor is not necessarily the equivalent of self-incrimination.

This would seem plainly to be so, since whether a judge or prosecutor in a criminal case is or is not allowed to comment on the failure of the defendant to take the stand, or whether a jury is specifically authorized by statute to consider his failure to do so, it is inevitable that, with or without specific statutory authority, the jury will, nine times out of ten, give consideration to such failure as at least some evidence of guilt.

In other words, it cannot with certainty be said, either in the *Adamson* case or in the *Twining* case, that the statutory authority for comment on, and consideration of, the defendant's failure to take the stand, was the basis for the jury's conclusion of guilt, since the jury might have reached that conclusion without any such statutory authority, or action under it.

Certainly if the constitutional question necessarily involved in both the *Twining* case and the *Adamson* case was, instead of the broader right against self-incrimination, the more limited right of the accused to be protected against comment of the judge or prosecutor or consideration by the jury of failure of the accused to take the stand, that more limited right, even more clearly than the broader right against self-incrimination, *cannot be ranked with the "right to hearing before condemnation"*.

Under either aspect of those cases, therefore, it becomes pertinent to inquire what are essential elements of the "right to hearing before condemnation". In other words, does that right, as part of due process of law under the 14th Amendment, include as essential elements, the right of an accused in a capital case to cross examination and rebuttal of witnesses against him and to such confrontation as is necessary for such purposes, where, as here, the information obtained from such witnesses is the sole basis upon which it has been undertaken to deprive the accused of his life? If "the right to hearing before condemnation" does include these elements as essential to due process of law, it seems clear, under the majority decision in the *Twining* case itself, that the validity of the New York statutes here in question cannot be upheld.

This Argument will, therefore, be essentially directed to the following propositions:

(1) Due process of law under the 14th Amendment includes as indispensable elements in a capital case, the right of a defendant to cross examine and rebut the testimony of witnesses against him, and to such confrontation as is necessary for those purposes.

(2) Since such rights are essential elements of due process of law under the 14th Amendment, a defendant in a capital case is entitled to be protected in them against *any agency* of the State authorized to deprive him of his life, and *at the point* at which such deprivation is authorized and undertaken.

(3) Where, as here, the statutes of a State authorize the trial judge in a capital case to disregard the jury's recommendation of a life sentence and to sentence an accused to death, such statutes must also require that the trial judge observe such rights *in connection with*

***such sentence of death*, if such rights are to have any substantial meaning *at the only point* at which the State has, in fact, undertaken to deprive appellant of his life.**

(4) The statutes of the State of New York, here involved, are therefore repugnant to the due process clause of the 14th Amendment, since the Court of Appeals of that State has construed such statutes as authorizing the trial judge, *on sentence*, to deprive appellant of his life on the basis of information obtained by the judge after verdict, from witnesses as to whom appellant was afforded no right of cross examination or rebuttal, nor the confrontation necessary for such purposes.

It would seem improbable that any serious contention will be made that the term "due process of law" as used in the 14th Amendment does not include, as indispensable elements in a capital case, the right of an accused to cross examine and rebut the testimony of witnesses against him, and to such confrontation as is necessary for those purposes.

While, however, it will probably be conceded that such rights are indispensable to due process of law under the 14th Amendment *prior to the verdict of the jury*, it may, nevertheless, be contended that they are not indispensable in connection with information obtained by a judge *after verdict, as a basis for sentence*, under the authority of probation statutes such as Section 482 of the Code of Criminal Procedure of the State of New York.

Such a contention would, of course, contravene the repeated decisions of this Court cited in footnote[9] and footnote[10] at page 17 of this brief, that an accused is entitled under the 14th Amendment to be protected against deprivation of life without due process of law, *by any agency of a State*, and *at every stage of judicial proceedings*, including the sentencing by a judge.

What, however, is even more fallacious in such a contention here, is, that assuming such rights are indispensable elements of due process of law under the 14th Amendment, such a contention would deprive appellant of his life without protection of those rights against the only agency by whom, and at the only point at which, such deprivation has been undertaken in this case,—by the trial judge on sentence.

Let there be no mistake as to this. Here, under the authority of the statutes of the State of New York, the jury had refused to deprive appellant of his life on the basis of testimony of witnesses before the jury, as to whom appellant was accorded the right of cross-examination and rebuttal, and the confrontation necessary for those purposes. Here, the trial judge implicitly concedes that such refusal of the jury to deprive appellant of his life on the basis of the testimony so before them was justified. Under the authority of the same statutes, however, the trial judge has undertaken, on sentence, to deprive appellant of his life, not on the basis of such testimony before the jury, but solely on the basis of information received by such judge, after verdict, from witnesses as to whom appellant was accorded no such rights.

Obviously, therefore, if the express provision of the 14th Amendment, "* * * nor shall any State deprive any person of life * * * without due process of law", is to have any substantial meaning in this case, it must here be applied at the point where such deprivation of life has here been undertaken, that is, on sentence by the judge, and not on verdict by the jury. The statutes of the State of New York, in failing to afford such protection at the actual point at which the deprivation of appellant's life has been authorized by

them, and undertaken by the trial judge, would seem therefore clearly repugnant to the due process clause of the 14th Amendment.

It remains, therefore, to determine whether the term, "due process of law", as used in the 14th Amendment, includes, as indispensable elements, the right of a defendant in a criminal proceeding to cross-examine and rebut the testimony of witnesses against him, and to such confrontation by such witnesses as is necessary for such purposes. There would seem to be but one answer possible to that question under the decisions of this Court, and that is, that such rights are indispensable elements of due process of law under the 14th Amendment.

Before, however, referring to the specific decisions of this Court so holding, it is interesting to note that this Court apparently has had infrequent occasion to express a specific opinion on this subject, and that this is undoubtedly due to the fact that the inclusion of such rights within the meaning of "due process of law" under the 14th Amendment has been so generally recognized and observed, that there has seldom been violation of them. Indeed, as will subsequently be pointed out, these rights are the very basis of the Hearsay Rule.

It is further to be pointed out that the reason this Court has never previously had occasion to consider such rights in connection with the basis upon which a trial judge has undertaken, under authority of either Federal or State statutes, to disregard the recommendation of a jury of a life sentence, is that, with the exception of four States, the statutes of all States, as well as those of the United States, which confer power upon the jury to make such recom-

mendation, make such recommendation mandatory upon the judge.* Furthermore, it is believed that counsel for appellees will concede that in the State of New York, which is among the four States in which the jury's recommendation is not made mandatory upon the trial judge, the jury's recommendation has never been ignored, other than in the present case, except in three instances, and that one of these involved this same trial judge.

Without undertaking an exhaustive citation of the decisions of this Court recognizing that the term "due process of law", as used in the 14th Amendment, includes as indispensable elements in any case involving the deprivation either of life or liberty, the right of the defendant to cross examination and rebuttal of the witnesses against him, and to such confrontation as is necessary for these purposes, it will suffice to refer to the express holding to this effect in the Court's recent decision, *In re Oliver*, 333 U. S. 257, and to the Court's assumption to the same effect in its earlier decision in *Snyder v. Massachusetts*, 291 U. S. 97.

In the *Oliver* case, the Court said, p. 273:

> "We further hold that failure to afford the petitioner a reasonable opportunity to defend himself

*See concurring opinion of Mr. Justice Frankfurter in *Andres v. United States*, 333 U. S. 740, 758. As there shown, a jury's recommendation of life imprisonment is not mandatory on the trial court only in the States of Delaware, New Mexico and Utah. To these three States, however, must be added a fourth, the State of New York. In *People v. Cole*, 285 N. Y. 838, the Court of Appeals of New York has held that the recommendation of life imprisonment in a felony murder case, authorized by Sections 1044, 1045 and 1045-a of the Penal Laws of the State of New York, is not binding upon the trial judge, but that the trial judge has discretion to disregard the jury's recommendation and to sentence a defendant to death.

> against the charge of false and evasive swearing was a denial of due process of law. A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense—a right to his day in court—are basic to our system of jurisprudence; *and these rights include, as a minimum, a right to examine the witnesses against him, to offer testimony, and to be represented by counsel.*" (Italics supplied.)

It is true that the *Oliver* case did not involve a criminal proceeding, but a contempt proceeding; and that, as shown in the portion of the Court's opinion immediately following the foregoing quotation, the State of Michigan conceded that had the case been a criminal one, Oliver would have been entitled, under due process of law, to cross-examine the witnesses against him and to offer testimony in rebuttal. The State contended, however, that such rights do not inhere in a commitment for contempt as to which, ordinarily, the powers of the court are plenary. It is all the more significant, therefore, that this Court held that such rights do inhere even in a commitment for contempt.

In *Snyder* v. *Massachusetts*, 291 U. S. 97, this Court had previously said, page 106:

> "Thus, the privilege to confront one's accusers and cross-examine them face to face is assured to a defendant by the Sixth Amendment in prosecutions in Federal courts (citing case), and in prosecutions in the state courts is assured very often by the constitutions of the states. For present purposes we assume that the privilege is reinforced by the Fourteenth Amendment, though this has not been squarely held (citing cases). *Hopt* v. *Utah*,

110 U. S. 574, has been distinguished and limited (citing cases).*

At page 114 of the same case:

> "A defendant in a criminal case must be present at a trial when evidence is offered, for the opportunity must be his to advise with his counsel (*Powell* v. *Alabama*, 287 U. S. 45), and cross-examine his accusers. (citing cases)."

It will thus be observed that what was at least conceded or assumed by the Court in the *Snyder Case, supra*, in this respect, has been unequivocally affirmed by this Court in the *Oliver* case, *supra*.

There would seem to be no warrant for burdening the Court with detailed references to those decisions in which it has repeatedly recognized that due process of law under the 14th Amendment includes the right to notice of hearing and a fair opportunity to be heard and to defend. (See cases cited in *Twining* v. *New Jersey*, 211 U. S. 78, pp. 111-112; see also footnote, p. 273 in *Re Oliver, supra*). Neither would it seem necessary to refer in detail to those decisions

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*It may be well to note that none of the cases cited by the Court in reality throw any doubt on the right of an accused in a criminal case to cross examination and rebuttal of witnesses against him, and to such confrontation as is necessary for those purposes. Neither do they modify or distinguish the *Hopt* case in so far as that decision requires strict adherence to the hearsay rule "where life or liberty are at stake", subject only to the established exceptions to that rule. The cases cited merely represent either (1) situations where the presence of the accused at some stage of the proceedings was not in reality necessary to the effective protection of such rights, or (2) established exceptions to the hearsay rule permitting the use of testimony by witnesses in prior proceedings, or in part of the same proceedings, which originally had been subjected to cross examination by the accused.

of the Court which hold, in substance, that what due process of law under the 14th Amendment does require,

> "* * * is that state action, whether through one agency or another, shall be consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions * * *." *Hebert* v. *Louisiana*, 272 U. S. 312, p. 316.

See to the same effect, *Palko* v. *Connecticut*, 302 U. S. 319, p. 328.

The only further reference to an expression of the Court in this respect, therefore, which will here be made, is to its holding in the *Snyder* case, *supra*, p. 105, that State action, to be consistent with due process, must not violate a "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental".

In connection with this statement of the Court in the *Snyder* case it is desired to refer to what is said in Wigmore on Evidence Vol. V (Third Edition), Sec. 1367. It is there said:

> "For two centuries past, the policy of the Anglo-American system of Evidence has been to regard the necessity of testing by cross-examination as a vital feature of the law. The belief that no safeguard for testing the value of human statements is comparable to that furnished by cross-examination, and the conviction that no statement (unless by special exception) should be used as testimony until it has been probed and sublimated by that test, has found increasing strength in our lengthening experience.
>
> Not even the abuses, the mishandlings, and the puerilities which are so often found associated with cross-examination have availed to nullify its value.

It may be that in more than one sense it takes the place in our system which torture occupied in the mediaeval system of the civilians. Nevertheless, it is beyond any doubt the greatest legal engine ever invented for the discovery of truth."

At Section 1362 *idem.* it is stated:

"Theory of the Hearsay Rule. The fundamental test, shown by experience to the invaluable, *is the test of Cross-examination.* The rule, to be sure, calls for two elements, Cross-examination proper, and Confrontation; but the former is the essential and indispensable feature, the latter is only subordinate and dispensable."

It is further stated at Section 1365 *idem.*:

"Now Confrontation is in its main aspect, *merely another term for the test of Cross-examination.* It is the preliminary step to securing the opportunity of cross-examination; and, so far as it is essential, this is only because cross-examination is essential."*

Counsel for appellant believe further argument is neither necessary nor warranted to establish that due process of law under the 14th Amendment includes, as indispensable elements, the right of an accused in a capital case to cross examination and rebuttal of the testimony of witnesses against him, and to such confrontation as is essential for those purposes.

There is, however, one other recent decision of this Court to which counsel feel reference should appropriately be made, though it is applicable rather to the general char-

*Capitals and italics in all these quotations are Wigmore's.

acter of the proceedings on sentence in appellant's case, on the basis of which the trial judge undertook to deprive appellant of his life, rather than to the specific question of appellant's right to cross examination and rebuttal of the testimony of witnesses against him, as part of due process of law under the 14th Amendment.

In *Townsend v. Burke*, 334 U. S. 736, the defendant had been convicted in the State Court of Pennsylvania of burglary and robbery. He had been held incommunicado for a period of forty hours after his arrest and had not been offered or advised of his right to assistance of counsel. In imposing sentence the Court, either through misinformation or mis-reading the record, acted in determining the severity of the sentence to be imposed, on certain assumptions concerning his criminal record which were materially untrue. The Court said (pp. 740-741):

> "Consequently, on this record we conclude that, while disadvantaged by lack of counsel, this prisoner was sentenced on the basis of assumptions concerning his criminal record which were materially untrue. *Such a result, whether caused by carelessness or design, is inconsistent with due process of law, and such a conviction cannot stand.*
>
> We would make clear that we are not reaching this result because of petitioner's allegation that his sentence was unduly severe. The sentence being within the limits set by the statute, its severity would not be grounds for relief here even on direct review of the conviction, much less on review of the state court's denial of habeas corpus. *It is not the duration or severity of this sentence that renders it constitutionally invalid; it is the careless or designed pronouncement of sentence on a foundation so extensively and materially false, which the prisoner had*

no opportunity to correct by the services which counsel would provide, that renders the proceedings lacking in due process.

Nor do we mean that mere error in resolving a question of fact on a plea of guilty by an uncounseled defendant in a non-capital case would necessarily indicate a want of due process of law. Fair prosecutors and conscientious judges sometimes are misinformed or draw inferences from conflicting evidence with which we would not agree. But even an erroneous judgment, based on a scrupulous and diligent search for truth, may be due process of law.

In this case, counsel might not have changed the sentence, but he could have taken steps to see that the conviction and sentence were not predicated on misinformation or misreading of court records, a requirement of fair play which absence of counsel withheld from this prisoner." (Italics supplied)

There would seem to be a striking parallel between the basic grounds on which this Court condemned the conduct of the trial judge *on sentence* in the *Townsend* case and the grounds on which it is submitted the conduct of the trial judge *on sentence* in this case should be condemned, particularly since here such conduct has been held by the Court of Appeals of New York to be authorized fully by the statutes of that State, here involved. If the statutes of New York, authorizing such conduct on sentence, are here to be upheld as not repugnant to the 14th Amendment, it means that it is immaterial whether sentence is pronounced "on a foundation * * * extensively and materially false", since under those statutes an accused may be denied, as here, any opportunity for determining those very facts. Moreover, so construed, those statutes certainly require no such

"scrupulous and diligent search for truth", as under the *Townsend* case, might prevent a merely erroneous judgment under them from constituting a denial of due process of law.

Finally, counsel for appellant feel it only fair to say that, assuming the Court of Appeals erred in its decision that the statutes in question, so construed, are not repugnant to the 14th Amendment, a large share of the responsibility for any error in this respect rests with counsel. At the time counsel raised such constitutional questions in that Court, counsel had not had the opportunity for the more mature consideration which it has since been possible to give them, and, therefore, were unable to present as full a discussion of them as they have here undertaken. Indeed, at the time counsel first approached this Court, they were scarcely in better position, and so far as a more substantial showing may here be made in support of their contentions in these respects, it is in no small measure due to the benefit which counsel were afforded through discussions with various members of the Court.

More mature consideration, however, has served only to confirm counsels' first impression that the implications inherent in upholding the validity of the State statutes here involved, may well go far beyond their application to this particular case. In counsel's opinion, nothing could afford those at home and abroad, who charge that our democratic institutions are a fraud and a delusion, better ammunition for their propaganda, than to be able to say, and to say truthfully, that the Constitution of these United States is powerless to protect any person within them, from being deprived of his life by any State choosing to do so, on the testimony of witnesses with whom he has never been confronted and on the basis of documents he has never seen,

and without any cross-examination or rebuttal of such witnesses and documents, provided only that such State chooses as its agency and as its point of deprivation, a judge on sentence, instead of a jury on verdict.

CONCLUSION

Appellant respectfully submits that the judgment of the Court of Appeals of the State of New York, here appealed from, affirming the judgment of the County Court of Kings County and the sentence of death thereunder, should be reversed, and any sentence of death thereunder should be set aside and prohibited, since such judgment and sentence are based on a construction of the statutes of the State of New York here involved, which makes those statutes repugnant to the due process clause of the 14th Amendment to the Constitution of the United States.

EDWARD H. LEVINE,
JOHN F. FINERTY,
Counsel for Appellant,
120 Broadway,
New York 5, N. Y.

HERBERT M. LEVY,
ROBERT MARKEWICH,
of the New York Bar,
Of Counsel.

April 1, 1949

APPENDIX A

Verbatim Quotations of Sections of the Penal Laws of the State of New York Here Involved.

§ 1044. *Murder in first degree defined*

The killing of a human being, unless it is excusable or justifiable, is murder in the first degree, when committed:

* * *

2. By an act imminently dangerous to others, and evincing a depraved mind, regardless of human life, although without a premeditated design to effect the death of any individual; or without a design to effect death, by a person engaged in the commission of, or in an attempt to commit a felony, either upon or affecting the person killed or otherwise;

§ 1045. *Punishment for murder in first degree*

Murder in the first degree is punishable by death, unless the jury recommends life imprisonment as provided by section ten hundred forty-five-a.

§ 1045-a. *Life imprisonment for felony murder; jury may recommend*

A jury finding a person guilty of murder in the first degree, as defined by subdivision two of section ten hundred forty-four, may, as a part of its verdict, recommend that the defendant be imprisoned for the term of his natural life. Upon such recommendation, the court may sentence the defendant to imprisonment for the term of his natural life.

Verbatim Quotation of the Section of the Code of Criminal Procedure of the State of New York Here Involved:

§ 482. *If no sufficient cause shown, judgment to be pronounced*

If no sufficient cause appear to the court why judgment should not be pronounced, it must thereupon be rendered. Before rendering judgment or pronouncing sentence the court shall cause the defendant's previous criminal record to be submitted to it, including any reports that may have been made as a result of a mental, psychiatric or physical examination of such person, and may seek any information that will aid the court in determining the proper treatment of such defendant.

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Supreme Court of the United States

October Term, 1948

No. 671

SAMUEL TITTO WILLIAMS,
Appellant,

against

THE PEOPLE OF THE STATE OF NEW YORK,
Appellees.

Appeal From The Court of Appeals of The State of New York

APPELLEES' BRIEF

MILES F. McDONALD,
District Attorney, Kings County,
Attorney for Appellees,
Brooklyn, New York.

SOLOMON A. KLEIN,
Assistant District Attorney,
Of Counsel.

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Supreme Court of the United States

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SAMUEL TITTO WILLIAMS,

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THE PEOPLE OF THE STATE OF NEW YORK,

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Appeal From The Court of Appeals of The State of New York

APPELLEES' BRIEF

Opinions Below

The Court of Appeals of the State of New York unanimously affirmed, without opinion, a judgment of the County Court of Kings County convicting appellant of murder in the first degree and sentencing him to death. (*People v. Williams*, 298 N. Y. 803, official weekly advance sheets, No. 510, February 5, 1949.)

Jurisdiction

The jurisdiction of this Court is invoked under Section 1257, subd. 2, of Title 28 of the United States Code, upon the ground that the Court of Appeals of the State of New York erred in upholding the constitutional validity of Sections 1044, 1045 and 1045-a of the New York Penal Law and Section 482 of the New York Code of Criminal Procedure.[1] Appellant's contention is that these statutes, as construed by the Court of Appeals, are repugnant to the Fourteenth Amendment to the Constitution of the United States, in that they authorize a trial judge to disregard the jury's recommendation of life imprisonment and to impose the death penalty "on the basis of information supplied by persons as to whom appellant had been afforded no opportunity for cross-examination or rebuttal, and with whom he had not been confronted." (Appellant's Brief, p. 14.) The amended remittitur of the Court of Appeals recites that the question "was presented and necessarily passed upon" and that the Court held "that neither the statutes nor the sentence aforesaid violated the Fourteenth Amendment of the Constitution of the United States" (R. 21-23).

[1] The statutes involved are set forth in Appendix A, *infra*.

Statement of the Case

Appellant was indicted for the crime of murder in the first degree (R. 1). On arraignment he was advised of his right to be represented by counsel, and being financially unable to retain a lawyer, the court assigned three attorneys to represent him (R. 1). About four months later he was brought to trial which lasted fourteen days (R. 1). The evidence established that he killed the deceased while engaged in the commission of a burglary (R. 13). In such circumstances, New York law permits the jury upon finding a verdict of guilty to recommend life imprisonment.[2] The jury's recommendation, however, is merely advisory, the court having discretion to refuse to follow it and to impose the death penalty.[3] The trial court so informed the jury when the case was finally submitted, the court saying (R. 3-4):

> "You must bear in mind that if you bring in a verdict of guilty as charged, without a recommendation, it means that the Court must impose the death penalty. On the other hand, if you bring in a verdict of guilty with a recommendation of life imprisonment, it means that the Court may impose a life sentence.
>
> "You must also understand that in the event you find the defendant guilty and recommend life imprisonment, that the Court is not bound to accept your recommendation."

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[2] N. Y. Penal Law, sec. 1045-a, quoted in Appendix A, *infra*.

[3] People v. Cole, 285 N. Y. 838; People v. Ertel, 283 N. Y. 519, 520.

The jury found appellant guilty as charged and recommended imprisonment for life (R. 1, 4). In accordance with established practice regulated by statute applicable to all cases, the court was required, before imposing sentence, to cause appellant's previous criminal record to be submitted to it, including any reports that may have been made as a result of a mental, psychiatric or physical examination, and was further authorized to "seek any information that will aid the court in determining the proper treatment" of the appellant.[4] Probation officers had to "fully investigate and report to the court in writing on the circumstances of the offense, criminal record and social history" of the appellant, and the court was required to "have such information before it prior to sentence or adjudication."[5]

After a pre-sentence investigation as above authorized was completed, the court held a pre-sentence hearing in which appellant and his counsel participated (R. 4-20). Appellant was asked whether he had anything to say why judgment should not be pronounced against him. He replied that he did not commit the crime (R. 5). The court then heard argument by each of appellant's attorneys who urged various reasons for accepting the jury's recommendation (R. 4-11). Thereupon, appellant was again asked whether he wanted to say anything, and when he replied that he did not commit the crime and was ready for sentence (R. 11-12), the court made a detailed statement (R. 12-20), setting forth its reasons why "the best interests of society would not be served by following the recommendation of the jury" (R. 19).

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[4] N. Y. Code Crim. Proc., Sec. 482, quoted in Appendix A, *infra*.

[5] N. Y. Code Crim. Proc., Sec. 931, quoted in Appendix B, *infra*.

The court noted that it gave the matter "grave and serious consideration" (R. 18), that it "searched for any facts which would justify the acceptance of the jury's recommendation" (R. 18) but "found nothing in (appellant's) favor" (R. 19), that his record stamped him "as a dangerous criminal" and a "menace" to society (R. 19), and expressed the opinion that "if the jury had before it the facts contained in the probation report, the recommendation would never have been made" (R. 19).

Before imposing sentence the court revealed in detail the information it had received from the probation department and other sources concerning appellant's background and prior misconduct. Appellant and his counsel were told that in evaluating the jury's recommendation the court considered the evidence given at the trial in the light of such additional information, which because of the rules of evidence could not be brought to the attention of the jury (R. 12-13).

Briefly stated, the information considered by the court was to the following effect: Appellant had been "in difficulties with law enforcement agencies since he was about 11 years of age" (R. 12); he "was on probation when the crime involved here was committed" (R. 12); he was "a full-time burglar" (R. 17) who committed about thirty burglaries in the same vicinity where the murder occurred (R. 14); when he was arrested the police found in his room "about eighteen pawn tickets and personal property which had been reported stolen" (R. 15) and which he claimed "was either won by him in crap games or bought by him from different men unknown to him" (R. 17); he was identified by a woman as the man who committed a burglary in her apartment where he stole a wrist watch and a

wallet containing some money, the wrist watch being one of the articles found by the police in his room (R. 16-17); he admitted the commission of this crime to the detectives who questioned him (R. 17); he was also identified by a seven year old girl as the perpetrator of a sexual attack committed upon her in her home (R. 17); the probation report further indicated that he was a "psychopathic liar" who was "permeated with psychosexual habits of thought and conduct" (R. 16); in the opinion of the police and the probation department he not only attempted to burglarize the home of the deceased, but also "probably attempted to ravish her" (R. 14); and finally, the probation department deemed him "to be a menace to society" (R. 18).

It is significant that although the court revealed the foregoing information, neither appellant nor his counsel made any claim that all or any part of it was untrue or inaccurate in the slightest respect. No request was made to be confronted with the witnesses supplying the information. Nor was any request made for an opportunity to offer rebuttal evidence. Since appellant and his counsel remained silent when confronted with the information above related, the court acted on its conclusion to reject the jury's recommendation and imposed the death penalty (R. 20).

When the case reached the Court of Appeals appellant raised the contention that Sections 1044, 1045 and 1045-a of the New York Penal Law and Section 482 of the New York Code of Criminal Procedure[6] violated the Fourteenth Amendment to the Constitution of the United States "in that they sanctioned or permitted the sentence of death

[6] The statutes are set forth in Appendix A, *infra*.

to be based upon information supplied by persons with whom the accused had not been confronted and as to whom he had no opportunity for cross-examination or rebuttal" (R. 21-22). The Court of Appeals held "that neither the statutes nor the sentence aforesaid violated the Fourteenth Amendment of the Constitution of the United States" (R. 22).

Argument

Having been found guilty of murder in the first degree after a trial conducted in accordance with due process of law, it was within the court's discretion to reject the jury's recommendation of life imprisonment and to impose the death penalty.[7] Appellant concedes that in making this permissible choice the court could properly have based its sentence solely upon its own evaluation "of evidence already of record at the time of the jury's verdict".[8] He contends, however, that when the court obtained additional information subsequent to the jury's verdict to aid it in determining the appropriate punishment, the Fourteenth Amendment prohibited the court from relying thereon unless it confronted the defendant "with witnesses giving such testimony" and afforded him an "opportunity for cross-examination and rebuttal".[9]

In short, appellant's position is not only that the Fourteenth Amendment guarantees the right of confronta-

[7] *People* v. *Cole*, 285 N. Y. 838; *People* v. *Ertel*, 283 N. Y. 519, 220.

[8] Appellant's Brief, page 13.

[9] Appellant's Brief, page 13.

tion, cross-examination and rebuttal during the trial, but also during the proceedings on sentence. Due process of law, we are told, is not satisfied if a convicted defendant is represented by counsel and is given an opportunity to be heard in open court as to why judgment should not be pronounced against him, unless the court restricts its judgment to an evaluation of the social and moral implications of the evidence already presented to the jury. If further enlightenment is to be sought to aid in determining the social problem as to what is to be done with a defendant who stands convicted, the court, it is said, must give the defendant an additional trial.

Nor does this exhaust all of the rights that are necessarily embodied in appellant's interpretation of the Fourteenth Amendment. Appellant cannot escape the fact that when the trial court revealed the information received from the probation department and other sources, neither he nor his counsel made any claim that it was untrue or even suggested that the witnesses be called and subjected to cross-examination. If, for example, the information that he was "a full-time burglar" (R. 17) whose entrance into the home of the deceased "was the result of experience he had had on thirty other burglaries" committed "about two months prior to the murder" (R. 14) were untrue, it would be known to the appellant. His complete silence when confronted with this information in the presence of his counsel must be deemed as acquiescence in its truth or at least as an intelligent waiver of the assumed right to cross-examine the witnesses. Surely, the least any defendant must do, if he would annul a traditional practice as a denial of due process of law, is to show that in the particular case in which the practice is challenged

he was denied an opportunity to prevent an injustice. Under the facts involved, therefore, it would be essential to hold, if appellant's argument is to be sustained, that even though cross-examination and rebuttal may be waived at the trial, they become constitutionally indispensable at the time of sentence.

Apart from the question of acquiescence or waiver, however, appellant's contention, if held valid, would lead to a revolutionary change in long established practice, which thus far has not been held violative of due process. It is fundamental that the question of punishment within the limits prescribed by statute is controlled solely by the conscience and sound discretion of the trial judge. Appellant recognizes that in imposing sentence the court need not state the reasons which impelled it to exercise its discretionary power unfavorably to the defendant. He urges, however, that had such been the situation in the instant case, he would still maintain that he was denied due process of law, but would simply be in the unfortunate position of being unable to prove that the court relied on *ex parte* information. The difficulty with this contention is that it attempts to evade an unavoidable effect of the claimed constitutional right of cross-examination and rebuttal at the time of sentence. If a defendant has such right, no court could refuse to disclose its reasons for imposing a particular sentence and thereby bar the defendant from an opportunity to assert and prove that due process of law was violated. A defendant would be able to compel the court to disclose whether or not it was relying on information obtained from the probation department or any other source, and if so, to demand that the witnesses be called and subjected to cross-examination.

To adopt appellant's view of the Fourteenth Amendment, therefore, would mean that every defendant could demand two trials—one trial on the question of guilt and the second trial on the question of sentence. This would be so for the obvious reason that in determining the punishment to be imposed "justice generally requires consideration of more than the particular acts by which the crime was committed and that there be taken into account the circumstances of the offense together with the character and propensities of the offender."[10] That is why the New York statute, which appellant attacks as unconstitutional, authorizes the court to "seek any information that will aid the court in determining the proper treatment" of the defendant.[11] Substantially the same power is conferred by the Federal Rules of Criminal Procedure which "are intended to provide for the just determination of every criminal proceeding."[12] Rule 32 thereof provides, in part:

"(c) *Pre-sentence Investigation.*

(1) *When Made.* The probation service of the court shall make a pre-sentence investigation and report to the court before the imposition of sentence or granting of probation unless the court otherwise directs. * * *

(a) *Report.* The report of the pre-sentence investigation shall contain any prior criminal record of the defendant and such information about his characteristics, his financial condition and the circumstances

[10] *Pennsylvania ex rel. Sullivan* v. *Ashe*, 302 U. S. 51, 55.

[11] N. Y. Code Crim. Proc., Sec. 482, quoted in Appendix A, *infra*.

[12] Rule 2 of the Federal Rules of Criminal Procedure, 327 U. S. 821-876.

affecting his behavior as may be helpful in imposing sentence or granting probation * * *, and such other information as may be required by the court."

The foregoing requirements of the Federal Rules of Criminal Procedure clearly proceed upon the basis that a defendant is not entitled as a matter of constitutional right to test the information obtained as a result of a pre-sentence investigation by means of a trial with the right of cross-examination and rebuttal. If a defendant could demand such a trial, it is obvious that it might be made the occasion of delays and obstructions which would bring reproach upon the administration of the criminal law and even discredit "the great immunities assured by the Fourteenth Amendment." [13]

Apparently realizing the dangerous implications of his contention, appellant seeks to restrict the claimed constitutional guarantee of cross-examination and rebuttal at the time of sentence to capital cases only. In a non-capital case, says the appellant, "a judge may act on the basis of information obtained *ex parte* from probation reports or other sources", but urges that "in practical application the effect of the prohibition (that no person shall be deprived of life or liberty without due process of law) differs as between deprivation of life and deprivation of liberty." [14] Due process of law, however, may not be denied merely because liberty rather than life hangs in the balance. "Certainly due process shows no less solicitude for liberty than for life. A man facing a prison term may, indeed, have as much at stake as life itself." [15]

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[13] *Snyder* v. *Massachusetts*, 291 U. S. 97, 122.

[14] Appellant's Brief, page 22.

[15] Dissenting opinion in *Bute* v. *Illinois*, 333 U. S. 640, 681.

Enough has been said to bring to light the inherent weakness of appellant's position. It remains to point out that his contention stems from a failure to recognize "the distinction everywhere drawn between proceedings at the trial and those before and after" and from an attempt to identify the privilege of a hearing at the time of sentence with the privilege of confrontation "which is limited to the stages of the trial when there are witnesses to be questioned."[16] Proceedings on sentence do not constitute a trial nor any part of a trial in the sense in which a trial was understood at common law. This is evident from two considerations. In the first place, "When a court is prepared to pass sentence, there is no requirement that it shall take testimony to assist it in arriving at its judgment. It may, if it so desires, but that is a matter for the trial court alone to decide."[17] In the second place, traditional practice for many years permits a sentencing judge to rely on any information which would aid him in determining the appropriate punishment, even though such information would not be admissible on a trial of the issue of guilt or innocence. The rule is succinctly stated in *Stobble* v. *United States* (C. C. A. 7), 91 Fed. 2d 69, 71, as follows:

> "It seems to be the position of appellant that the court is not permitted to acquire any information other than what would be admissible on a trial before a jury. We know of no such law. After the court had found appellant guilty, it was quite proper for it to acquire any available information * * * which would.

[16] *Snyder* v. *Massachusetts*, 291 U. S. 97, 107, 128-129.

[17] *State* v. *Vennum*, 149 Wash. 670, 674.

enable it to properly determine the appropriate punishment."[18]

A case precisely in point is *Stephan* v. *United States* (C. C. A. 6), 133 Fed. 2d 87, certiorari denied 318 U. S. 781; rehearing denied 319 U. S. 783. In the case cited, the defendant was convicted for treason and was sentenced to death by hanging pursuant to Title 18, Sec. 2, of the United States Code, which provides that "whoever is convicted of treason shall suffer death; or, at the discretion of the court, shall be imprisoned not less than five years and fined not less than $10,000 * * *." In deciding to impose the death penalty, the court obtained information in Chambers concerning the defendant from representatives of the Federal Bureau of Investigation and the chief probation officer. On appeal the Circuit Court held (at p. 100):

> "The record indicates that these various interviews took place in the Chambers of the Judge. The information thus made available is set forth in great length in connection with the sentence. Appellant insists that this procedure was improper. We take judicial notice that the practice of presentence investigations has long been followed in district courts. See Tractenberg v. United States, 53 App. D. C. 396, 293 F. 476, 480; Stobble v. United States, 7 Cir., 91 F. 2d 69, 71; Sharp v. United States, 4 Cir., 55 F. 2d 227. See also Title 18, Ch. 22, Sec. 727, U. S. C. A., which makes it the duty of a corporation officer to investigate any case referred to him for investigation by the court and his further duty to perform such

[18] See also *Hunter* v. *United States* (C. C. A. 6) 149 Fed. 2d 710, 711; certiorari denied 326 U. S. 787; rehearing denied 327 U. S. 814; *Escoe* v. *Zerbst*, 295 U. S. 490, 492-493.

other duties as the court may direct. The Rules of Practice and Procedure in Criminal Cases, supra, 292 U. S., page 661, 54 S. Ct. XXXVII, under the heading '1. Sentence' also clearly recognize not only the propriety but the importance of such investigation. We think, however, that such information should have been disclosed to the Judge in open court and in the presence of appellant. Such appears to have been the practice in the cases cited. We think that the interest of convicted persons about to be sentenced is more carefully safeguarded by open hearings under such rules as the court may adopt. But the real question here is, whether upon the record as we find it, there was an abuse of judicial discretion in fixing the sentence and we find none."

This Court denied certiorari (318 U. S. 781) and denied a rehearing (319 U. S. 783).

Conclusion

It is respectfully submitted that appellant has not presented a substantial federal question and that the judgment of the Court of Appeals of the State of New York should be affirmed.

Dated, Brooklyn, N. Y., April, 1949.

Miles F. McDonald,
District Attorney, Kings County,
Attorney for Appellees,
Brooklyn, New York.

Solomon A. Klein,
Assistant District Attorney.

Appendix A

New York Penal Law, Sections 1044, 1045 and 1045-a:

Sec. 1044. Murder in first degree defined

The killing of a human being, unless it is excusable or justifiable, is murder in the first degree, when committed:

* * *

2. By an act imminently dangerous to others, and evincing a depraved mind, regardless of human life, although without a premeditated design to effect the death of any individual; or without a design to effect death, by a person engaged in the commission of, or in an attempt to commit a felony, either upon or affecting the person killed or otherwise;

Sec. 1045. Punishment for murder in first degree

Murder in the first degree is punishable by death, unless the jury recommends life imprisonment as provided by section ten hundred forty-five-a.

Sec. 1045-a. Life imprisonment for felony murder; jury may recommend

A jury finding a person guilty of murder in the first degree, as defined by subdivision two of section ten hundred forty-four, may, as a part of its verdict, recommend that the defendant be imprisoned for the term of his natural life. Upon such recommendation, the court may sentence the defendant to imprisonment for the term of his natural life.

New York Code of Criminal Procedure, Section 482:

Sec. 482. If no sufficient cause shown, judgment to be pronounced.

If no sufficient cause appear to the court why judgment should not be pronounced, it must thereupon be rendered. Before rendering judgment or pronouning sentence the court shall cause the defendant's previous criminal record to be submitted to it, including any reports that may have been made as a result of a mental, psychiatric or physical examination of such person, and may seek any information that will aid the court in determining the proper treatment of such defendant.

Appendix B

New York Code of Criminal Procedure, Section 931:

Sec. 931. Investigation.

Probation officers when directed by the court shall fully investigate and report to the court in writing on the circumstances of the offense, criminal record and social history of a defendant, * * *. The court shall have such information before it prior to sentence or adjudication. * * *

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Supreme Court of the United States

OCTOBER TERM, 1948

No. 671

671

SAMUEL TITTO WILLIAMS,
Appellant,

against

PEOPLE OF THE STATE OF NEW YORK,
Appellees.

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

PETITION BY APPELLANT FOR RE-HEARING AND FOR STAY OF MANDATE.

JOHN F. FINERTY,
Counsel for Appellant,
120 Broadway,
New York 5, N. Y.

June 21, 1949

Supreme Court of the United States

OCTOBER TERM, 1948

No. 671

SAMUEL TITTO WILLIAMS, *Appellant,* *against* PEOPLE OF THE STATE OF NEW YORK, *Appellees.*	APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

PETITION BY APPELLANT FOR RE-HEARING AND FOR STAY OF MANDATE.

Despite the very real gratitude which counsel signing this petition* feels toward the Court for the consideration shown him personally during the somewhat unconventional course of this case, counsel believes that real respect toward this Court and toward his own obligations as a member of its Bar, requires that he make the following statements in support of this petition for a re-hearing and for stay of mandate.

Counsel asserts that in his considered opinion every major assumption of fact or of law in the majority opinion

*Counsel signing this petition was unwilling for his associates to sign it, and thereby to assume responsibility for its grave assertions, since the time available made it impossible for counsel to inform his associates even of the nature of such assertions and of the grounds believed to support them, not to speak of permitting him to obtain the valuable help of his associates by way of criticism or suggestions.

is, without exception, demonstrably unsound or obviously misapplied; therefore that the majority opinion can afford no proper basis for a final disposition of a concededly "serious and difficult question" of constitutional law, and that a refusal of this Court to re-consider that opinion can only be at the risk of a shocking miscarriage of justice.

No zeal of an advocate could excuse such grave assertions without the most substantial basis for them in fact and in law. They therefore should be answered and rebuked, or recognized and corrective measures taken. Under no circumstances, it is most respectfully submitted, would it seem this Court could be justified in adopting the other course only too easily open to it, that is, by a mere denial of this petition, to ignore such assertions without undertaking either to refute or admit them.

Counsel realizes that this petition should without avoidable delay proceed to set forth the precise grounds which it is believed justify the grave assertions made in it. Counsel believes, however, that brief delay in doing this is warranted in order to direct attention to the unusual circumstances under which this petition is submitted, and presumably must be considered.

The majority decision was made on June 6, 1949, but was not received by counsel until June 7. Under Rule 33 of this Court, as amended October 13, 1947, the time for filing a petition for re-hearing was shortened from the former period of twenty-five days after judgment, to fifteen days "after judgment or decision", unless such time is shortened or enlarged by the Court or a Justice thereof. On June 9 counsel applied to this Court for enlargements of time both for the filing of a petition for re-hearing and for the issuance of a mandate (a), because certain cir-

cumstances, not necessary here to elaborate, made the fifteen days prescribed by amended Rule 33 wholly inadequate for the proper preparation of a petition, and (b), because the brief time remaining before the end of this Term seemed to make it practically impossible for the Court to give adequate consideration to any petition that might be filed within the time prescribed. These enlargements were inexplicably denied* despite the humane agreement of counsel for the appellees, the District Attorney of Kings County of New York, Miles F. MacDonald, not to object to such enlargements, of which agreement this Court was fully advised.

Despite the denial of adequate time for preparation of this petition, counsel feels justified in asserting that the petition itself is adequate in substance. Had time for revision been available, the petition could probably have been slightly shortened. It, however, is not substantially longer than would in any event have been necessary for any serious and considered analysis of the majority opinion in relation to the grave assertions here made against its validity.

Counsel therefore respectfully submits that unless the members of this Court feel justified in concluding from such cursory perusal of this petition as alone would seem possible within the time remaining of this Term, that it is obviously and undeniably frivolous and improvident, it would be difficult for this Court to justify undertaking to dispose of this petition before the end of this Term. Counsel

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*Counsel desires to make entirely clear that he does not, and from his own experience could not, attribute such denial to any lack on the part of the Court of personal consideration for counsel. Moreover such enlargements were not requested on any such ground, but because they then seemed, and still seem, essential to an adequate opportunity to protect the life of his client from possibly unconstitutional deprivation.

therefore trusts that the members of this Court, and particularly the members of the majority in this case, will recognize that in order to reach a considered and sound conclusion as to whether a re-hearing should be accorded, it is essential that the issuance of the mandate be appropriately stayed beyond the time now specified by Rule 34 of this Court.

This petition will now proceed to a specification of the asserted invalidities in the majority opinion and of the grounds for such assertions:

SPECIFICATION OF MAJOR ASSUMPTIONS OF LAW OR OF FACT IN THE MAJORITY OPINION, WHICH IT IS ASSERTED, ARE EITHER DEMONSTRABLY UNSOUND OR OBVIOUSLY MISAPPLIED, WITH GROUNDS BELIEVED TO SUPPORT SUCH ASSERTIONS.

Though it would be preferable to consider the major assumptions of law and of fact in the majority opinion in their logical order or in the order of their importance, the structure of that opinion is such as to make it impractical to consider them except in the order in which they there first appear.

Counsel would like to lessen the burden on the Court by directing attention to those specifications which are most important. An attempt to do this convinces counsel that, with the possible exception of specifications "I" and "II", which are relatively unimportant to the essential issues on this appeal,* it is impossible to differentiate between the importance of the other specifications.

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*Even the assumptions considered in these two specifications, it will be shown, appear to play a part in influencing the assertedly fallacious conclusions of the majority opinion, beyond the proper importance of the assumptions, themselves.

I.

The majority opinion states, p. 2:

> "The evidence proves a wholly indefensible murder committed by a person engaged in a burglary."

It is clear that the majority report assumes, moreover, the identity of appellant with such person. It does not appear from the majority opinion whether this assumed identity is based merely on the acceptance by the majority of the jury's verdict of guilt, or on an independent examination of the entire evidence before the jury in this respect, contained in the transcript of record from the County Court of Kings County, which while filed in this Court, was not printed except as to the portion showing "proceedings on sentence".

In either respect, it ignores the only reasonable conclusion to be drawn either from the record as a whole or from the jury's verdict itself, that is, that the jury's recommendation of life imprisonment is wholly irreconcilable with any certainty on the part of the jury that the evidence before it proved beyond a reasonable doubt the identity of appellant with the person guilty not only of a "wholly indefensible murder", *but of a peculiarly brutal murder.*

That there is good basis in the record for the jury's obvious assumption that the evidence did not prove this beyond a reasonable doubt, appears from the following:

(1) The record shows that the only eyewitness to the murder, the nine-year old brother of the murdered girl, was not asked on direct examination as a witness for the State expressly to state whether the murderer

was a white man or a negro (Tr. 86-103).* The obvious reason for this developed on cross examination where it was shown that immediately after the murder the boy had told the police that the murderer was a white man of ruddy complexion, and that he at first unequivocally so admitted (Tr. 103). The record shows (Tr. 117-124) that only after obvious coaching during over-night recess, did he attempt to qualify this description of the murderer, by claiming that the light made it impossible for him to be sure whether the murderer was a white man or a negro. Further cross examination (Tr. 130-133) made this coaching so obvious that in order to stop it the prosecutor voluntarily stated (Tr. 133):

> *"* * * there is no contention by the People that this witness can identify this defendant or that he ever has".*

(2) It is not here denied that the State rested wholly on appellant's alleged confessions, which appellant testified, and witnesses for the State denied, had been extorted from the defendant. (See detailed transcript references under "X", *post*.)

The only reasonable assumption, therefore, is that although the jury found the defendant guilty of a peculiarly brutal murder, it recommended life imprisonment because it was in reality doubtful of guilt due to the State's admitted lack of any identification of appellant as the murderer, and the conflicting evidence as to whether appellant's confessions had or had not been extorted.

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*References in parentheses designated "Tr.", are to pages of those portions of the transcript of record from the County Court of Kings County, filed in this Court but not printed. References in parentheses designated "R" are to pages of the printed record in this Court.

Moreover that the avowed purpose of enacting Section 1045-A of the Penal Code of the State of New York, under which the jury here was authorized to make its recommendation of life imprisonment was not primarily humanitarian, as the majority opinion assumes, but was to make "it easier" to obtain convictions in doubtful cases of felony murder, is clear from the annual message of the Governor of that State on January 6, 1937, advocating, among other things, the enactment of that section. The Governor's message in this respect is quoted verbatim in the footnote*.

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*The Governors message in this respect reads as follows:

"While discussing the anti-crime program, I wish to bring once more to your attention, a somewhat related matter which has long been on my mind. That is, the necessity of changing the Penal Law on felony murder. Under our existing law, in the event that a murder occurs during the commission of any felony, all those involved are held equally responsible and if found guilty, must be sentenced to death. The jury has absolutely no discretion. The verdict must either be acquittal or murder in the first degree, for which the penalty is death. In other cases of murder, the jury has the right to bring in verdicts of murder in the first degree, murder in the second degree, or manslaughter. *As the result of the limitation placed on the jury in felony murder cases, the jury is faced with the choice of condemning to death a man for whom it would like to show some clemency or, on the other hand, of letting him go completely unpunished.* I believe that the sentence for felony murder should continue to be death—the same as for premeditated murder.

"However, I would empower a jury to accompany any verdict of guilty with a recommendation of executive clemency in which case the sentence shall not be death, but imprisonment for life. *My reasons for this recommendation are two-fold: the first is that it will make it easier for the jury to bring in verdicts of guilty in felony murder cases. In the second place, it will permit the jury to fit its verdict to what it may consider to be the varying degrees of moral guilt of the persons involved in the same crime.*

"I strongly recommend this change."

It will be observed from the two italicized portions of that quotation that the Governor's message, with revealing naivete, makes this primary purpose of Section 1045-a unmistakably clear.

II.

The majority opinion states, p. 3:

> **"About five weeks after the verdict of guilty with recommendation of life imprisonment, and after a statutory pre-sentence investigation report to the judge, the defendant was brought to court to be sentenced. Asked what he had to say, appellant protested his innocence. After each of his three lawyers had appealed to the Court to accept the jury's recommendation of a life sentenc the judge gave reasons why he felt that the death sentence should be imposed. He narrated the shocking details of the crime as shown by the trial evidence, *expressing his own complete belief in appellant's guilt."**

While it is true that the judge did express "his own complete belief in appellant's *guilt*", and therefore his agreement with that portion of the jury's verdict based on the evidence before the jury, *the majority opinion neglects to note that nowhere did the judge express disagreement with the other integral part of the jury's verdict, its recommendation of punishment by life imprisonment,* as based *solely* on the evidence before the jury, which evidence concededly had been subjected to cross-examination and rebuttal.

Indeed, the majority opinion, p. 1, implicitly recognizes this where it states:

> "In giving his reasons for imposing the death sentence, the judge discussed in open court the evidence upon which the jury had convicted, *stating*

*Throughout this petition italics and parenthetical matter in quotations are supplied unless otherwise stated.

that this evidence had been considered in the light of additional information obtained through the Court's 'Probation Department' and through other sources."

In other words, it is clear from the majority opinion itself, that the judge's refusal to accept the jury's recommendation of life imprisonment and his sentencing of appellant to death, was not based *solely* on evidence before the jury which had been subjected to cross-examination and rebuttal, but only on such evidence when considered in connection with the "additional information" narrated by the judge on sentence, which information had not been subjected to any such safeguards.

III.

The majority opinion states, p. 3, immediately following the foregoing statement from that opinion just quoted under "II":

> **"He (the judge) stated that the pre-sentence investigation revealed many material facts concerning appellant's background, *which though relevant to the question of punishment, could not properly have been brought to the attention of the jury in its consideration of the question of guilt.*"**

The majority opinion apparently accepts the correctness of the judge's assumption in this respect. In doing so, it fails to note that, contrary to the judge's assumption, all facts "relevant to the question of punishment" *not only could, but should properly have been brought to the attention of the jury*, not in connection with its consideration of the question of guilt, *but for its consideration in connection with the other integral and indispensable part of its verdict, the question of punishment;* (*People v. Hicks*, 287 N. Y. 165; cf. *Andres* v. *United States*, 333 U. S. 740).

Obviously, moreover, had the alleged facts developed by the pre-sentence investigation been, as they should have been, submitted to the jury, they would have been subject to cross-examination and rebuttal, and neither the trial court, nor this Court would be entitled to speculate whether under such circumstances the jury might, or might not, have made its recommendation of life imprisonment, or if it did, whether the judge would have disagreed with them.*

IV.

The majority opinion proceeds to state, p. 3, immediately following the statements just quoted under "III":

> **"He (the judge) referred to the experiences appellant had had on 30 other burglaries in and about the same vicinity where the murder had been committed. The appellant had not been convicted of these burglaries *although the judge had information that he had confessed to some* and had been identified as the perpetrator of some of the others."**

The only basis which counsel has been able to find in the trial judge's pre-sentence narration, or elsewhere in the record, to support the italicized portion of the above statement from the majority opinion, that "the judge had information that he (appellant) *had confessed to some*" of the 30 other burglaries is the statement in the judges pre-sentence narration (R. 16, 17) that "The defendant stole a wrist watch

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*While counsel accepts responsibility for failing previously to bring this point specifically to the attention of the Court, either on brief or argument, it is respectfully submitted that this, and other failures on the part of counsel, are accounted for at least in part, by what counsel believes to be the unwarranted haste on which the majority have insisted in the consideration and disposition of a capital case, involving what the majority opinion concedes to be, "a serious and difficult question" of constitutional law.

and a wallet containing some money from her (Rose Spector's) apartment, and admitted this crime to the detectives."

It is on this tenuous basis that the majority opinion, page 7, undertakes inferentially to treat appellant as included in the category of "repeated offenders": It is on this same slender basis that the majority opinion ignores the fact that the statutes here involved, as construed by the Court of Appeals of New York, are fundamentally distinguishable from the repeated offender statutes, the constitutionality of which have been sustained by this Court, on the express basis that such statutes *require proof of conviction of prior offenses*, and permit an accused not only to rebut evidence offered in this respect, but even seasonably to question the lack of constitutional safeguards in connection with such prior convictions.*

V.

The majority opinion further states, pp. 3, 4 and 11:

> **"The accuracy of the statements made by the judge as to appellant's background and past practices were not challenged by appellant or his counsel, nor was the judge asked to disregard any of them or to afford appellant a chance to refute or discredit any of them by cross-examination or otherwise." (p. 3)**
>
> * * * *
>
> **"Other due-process requirements mentioned in the *Oliver* case were that the defendant should be permitted to offer evidence in his own behalf and be represented by counsel. Appellant, however, was represented by counsel both when tried and sentenced *and the sentencing judge***

*To this latter effect, particularly, see *Gayes* v. *New York*, 332 U. S. 145, 149, footnote [8].

> *did not decline to permit introduction of any evidence. In response to the judge's inquiry, statements were made by appellant and his counsel*" (footnote 4, p. 4).
>
> * * * *
>
> "Appellant was found guilty after a fairly conducted trial. *His sentence followed a hearing conducted by the judge. Upon the judge's inquiry as to why sentence should not be imposed, the defendant made statements. His counsel made extended argument*" (p. 11).

These obviously related statements in the majority opinion seem peculiarly unfair both because of their apparent factual inaccuracies and of their unjustified legal assumptions:

(1) No opportunity whatever was in fact offered appellant or his counsel to say anything before sentence *after* the judge's narration of the alleged facts developed by his pre-sentence investigation (R. 20). Sentence was pronounced immediately following, and as an integral part of such narration. The only such opportunity offered, and the only statements made by appellant (R. 5, 11) or by his counsel (R. 5-12) were *prior* to the judge's narration.

(2) It must, moreover, be conclusively presumed that any request to the judge after such narration

> "* * * to afford appellant a chance to refute or discredit any of them (statements in the judge's narration) by cross-examination or otherwise."

would have been futile and would have been denied

(a) The basic theory of the majority itself is that no constitutional right exists to refute or discredit, by cross-examination or otherwise, alleged facts developed by pre-sentence investigation, and that any such right, moreover, would be wholly impractical;

(b) This also is the necessary implication from the judgment of the Court of Appeals, since to construe such judgment otherwise, would be for this Court both to impugn the certificate of the Court of Appeals that it had necessarily passed on the constitutional question here presented, and to stultify this Court's own assumption of jurisdiction of this appeal. If, in fact, such constitutional question had been waived by the failure of appellant to ask a chance *after sentence* to refute or discredit the judge's pre-sentence recitals, of which he had no notice when *before such recitals and sentence*, both the certificate of the Court of Appeals and this Court's assumption of jurisdiction would have been unwarranted.

VI.

The majority opinion states, pp. 4, 5 and 6:

> "That due process of law does provide these salutary and time-tested protections (reasonable notice of charges and opportunity to examine adverse witnesses) where the question for consideration is the guilt of a defendant, seems entirely clear from the genesis and historical evolution of the clause". (p. 4)
>
> * * *
>
> "Tribunals passing on the guilt of a defendant always have been hedged in by strict evidentiary procedural limitations." (p. 5)
>
> * * *
>
> "Courts have treated the rules of evidence applicable to trial procedure and the sentencing process differently." (Citing Cases). (P. 5, footnote 4)
>
> * * *
>
> "In addition to the historical basis for different evidentiary rules governing trial and sentencing procedures, there are sound practical reasons for the distinction.

> ***In a trial before verdict the issue is whether a defendant is guilty of having engaged in certain criminal conduct*** of which he has been specifically accused. Rules of evidence have been fashioned for criminal trials which narrowly confine the trial contest to evidence that is strictly relevant to the particular offense charged. These rules rest in part on a necessity to prevent a time consuming and confusing trial of *collateral issues*. They were also designed to prevent tribunals *concerned solely with the issue of guilt* of a particular offense from being influenced to convict for that offense by evidence that the defendant had habitually engaged in other misconduct." (pp. 5-6)

Conceding that these statements in the majority opinion are sound when applied *where the sole question in issue before verdict is that of guilt,* it is obvious that they can have no proper application where, as here, *the question of punishment was equally in issue before verdict,* and its determination was an integral and essential part of the verdict. *The failure of the majority opinion to recognize this,* results in permitting purportedly remedial statutes, such as Section 1045-A* of the Penal Laws of the State of New York, and Section 482 of the Code of Criminal Procedure of that State, *to become traps for the denial of due process of law.*

Any well considered application of the foregoing statements from the majority report would have recognized that where, as under Section 1045-a, the question of punishment *is not a collateral* but is an *essential issue* before verdict, all information necessary to the informed determina-

*As already noted; *ante,* footnote pp. 5, 6, the purpose of this section was, not, primarily at least, to permit the jury to differentiate between degrees of moral guilt, but to "make it easier" to obtain a verdict of guilt in a felony murder case where, because of doubt, the jury might not find such a verdict if capital punishment were mandatory.

tion by the jury should be presented to the jury before verdict, subject to the safeguards of due process which the *Oliver* case holds indispensable to the determination of guilt. *There can be no valid excuse for permitting such constitutional safeguards to be circumvented, as the majority opinion would do, by allowing the judge to withhhold from the jury information essential to their intelligent determination of the issue of punishment, where that issue is an integral and indispensable part of the jury's verdict, and then himself undertake to obtain such information in secret, free of any such constitutional safeguards.*

It would be no answer to this proposition to suggest that the trial judge in this case may not consciously have adopted any such device. *What this Court is reviewing on this appeal is not the motives actuating the judge's conduct,* but whether the statutes of New York, as construed by the Court of Appeals of that State, as authorizing that conduct, have had, and must necessarily have, the same result in depriving an accused of constitutional safeguards, as if the judge's conduct had been intentionally adopted as a device for such purpose.

Neither is it any answer, as the majority opinion assumes, that the exclusion from the jury of evidence of other crimes is "to prevent tribunals *concerned solely with guilt* from being influenced to convict for that offence by evidence that the defendant had habitually been engaged in other misconduct." In cases such as this, where the jury *is equally concerned with punishment* as with guilt, the rights of the defendant presumably can be guarded by appropriate instructions. Certainly this would seem obviously to threaten less danger to a defendant's rights than if a judge be authorized, as here, to inflict capital punishment

on the basis of pre-sentence information secretly received, without any safeguards whatever that the judge may not thus deprive a defendant of his life on the basis of *pre-sentence misinformation, which is irreparable.*

VII.

The majority opinion states, p. 5:

> **"A recent manifestation of the historical latitude allowed sentencing judges appears in Rule 32 of the Federal Rules of Criminal Procedure. That rule provides for consideration by federal judges of reports made by probation officers containing information about a convicted defendant, including such information 'as may be helpful in imposing sentence or in granting probation or in correctional treatment of the defendant . . .'"**

The majority opinion here neglects to state what it would seem should fairly have been stated in considering any *"recent manifestation* of the historical latitude allowed sentencing judges." That is, that the Advisory Committee on Rules of Criminal Procedure appointed by the Court itself, recommended the provision quoted by the Court *with, however, the following additional sentence,* which the Court, in adopting the Rule, deleted without explanation:

> "After determination of the question of guilt, the report shall be available, upon such conditions as the court may impose, *to the attorneys for the parties* and to such other persons or agencies having a legitimate interest therein as the Court may designate." (See Second Preliminary Draft, Federal Rules of Criminal Procedure, February 1944, Rule 34(c)(2), pp. 126-127.)

In addition the majority opinion ignores other such *"recent manifestations"* in this same connection:

(1) While the majority opinion cites (p. 5, footnote 7) *Stephan* v. *United States*, 133 Fed. 2d 87, 100, that opinion seems to ignore the following "recent manifestation," furnished by that citation:

> "We think, however, that such information should have been disclosed to the Judge in open court and in the present of appellant. *Such appears to have been the practice in the cases cited. We think that the interest of convicted persons about to be sentenced is more carefully safeguarded by open hearings under such rules as the court may adopt.*"

(2) The majority opinion fails even to cite *Zeff* v. *Sanford*, 31 Fed. Supp. 736, 738, though this case was cited and quoted by counsel for appellant on argument. There the court said:

> "The situation with respect to securing information to enable the Judge to wisely and justly impose sentence, procured after conviction or the entry of a plea of guilty, is quite different. In such case, under the technique of modern penology, the accused, who is supposedly entering his plea of guilty in open court or standing in open court before the Judge after verdict, is told that his case is to be investigated before imposition of sentence and he, unless he objects, impliedly consents to such investigation. It seems, therefore, perfectly proper for a thorough investigation to be made, after conviction or plea of guilty, of the accused's reputation, past offenses, economic, social and educational background, and of all other matters which a Judge should have before him in determining the kind of sentence which should be imposed. *Even in such cases, however, any information not received from the accused himself or not given in his presence, which might influ-*

ence the judgment, should be called to his attention, without necessarily disclosing the sources of such information, so that he may be afforded an opportunity to object to its use and to rebut same. Even after conviction or plea of guilty, great care should be exercised to see that the accused understands what is taking place and has, before sentence is imposed, a fair and full opportunity to answer charges made against him.

"If progress is to be made in the administration of criminal law and offenders treated in a scientific manner, such latitude must be left to the Judge unless blind and irresponsible judgments are to be imposed. *Pre-sentence investigation,* after conviction or plea of guilty, is the most just, effective and humane method, if *properly used*, of arriving at a sentence *which will protect both society and the accused.*"

It would, therefore, appear that this reference of the majority opinion to Rule 32 of the Federal Rules of Criminal Procedure, as a "recent manifestation of the historical latitude allowed sentencing judges," ignores the fact that the rule itself contravenes the recommendation of the Court's own Advisory Committee for limitations on such "historical latitude", and is also inconsistent with the restrictions on such "historical latitude," which the lower Federal courts have recognized to be necessary to arrive at a sentence "which will protect both society and the accused."

VIII.

The majority opinion states, p. 6:

"A sentencing judge, however, is not confined to the mere issue of guilt. His task within fixed statutory or constitutional limitation is to determine the type and extent of punishment after the issue of guilt has been

> determined. *Highly relevant—if not essential—to his selection of an appropriate sentence is the possession of the fullest information* possible concerning the defendant's life and characteristics. And modern concepts individualizing punishment have made it all the more necessary that a sentencing judge not be denied an opportunity to obtain pertinent information by a requirement of rigid adherence to restrictive rules of evidence properly applicable to the trial."

It has already been noted under "V", that "restrictive rules of evidence properly applicable to the trial", *should apply to information essential to the issue of punishment*, as well as to the issue of guilt, *where as here the determination of both issues* is, as under Section 1045-A an integral and essential part of the jury's verdict.

Passing this point, however, and conceding that what is highly relevant and essential to a judge's selection of an appropriate sentence, "is the possession of the fullest information possible concerning the defendant's life and characteristics," *the majority opinion wholly ignores that what is still even more relevant and essential* is to safeguard that "the fullest information" shall not, in reality, turn out to be the *fullest misinformation*, because of the failure to require the trial judge to exercise any safeguards whatever in obtaining it.

IX.

The majority opinion states, pp. 6, 7, 8 and 10:

> **"Undoubtedly the New York statutes emphasize a prevalent modern philosophy of penology that the punishment should fit the offender and not merely the crime." (P. 6).**
>
> * * *
>
> **"This whole country has traveled far from the period in which the death sentence was an automatic and com-**

monplace result of convictions—even for offenses today deemed trivial." (P. 7).

* * *

"Retribution is no longer the dominant objective of the criminal law. Reformation and rehabilitation of offenders have become important goals of criminal jurisprudence." (Pp. 7, 8).

"Modern changes in the treatment of offenders make it more necessary now than a century ago for observance of the distinctions in the evidential procedure in the trial and sentencing processes. For indeterminate sentences and probation have resulted in an increase in the discretionary powers exercised in fixing punishments. *In general, these modern changes have not resulted in making the lot of offenders harder.* On the contrary a strong motivating force for the changes has been the belief that by careful study of the lives and personalities of convicted offenders many could be less severely punished and restored sooner to complete freedom and useful citizenship." (Pp. 7 and 8)

* * *

So far as these statements are sound at all—and some of them are—they are grimly ironical when applied to appellant's case. It can be little comfort to appellant to know that the majority opinion does at least record its recognition that "retribution is no longer the dominant objective of criminal law", and that "reformation and rehabilitation of offenders have become important goals of criminal jurisprudence". This must be equally the case with this Court's recognition that "in general, these modern changes have not resulted in making the lot of offenders harder".

But at least two of these statements are not sound.

(1) *The New York statutes, as construed by the Court of Appeals of that State, do not "emphasize a prevalent modern philosophy of penology that the punishment should*

fit the offender and not merely the crime", though undoubtedly, this is the modern philosophy of penology.

Whether the punishment of death here proposed fits either the offender or the crime cannot be answered on this record. The jury, after some three weeks of trial, on the basis of evidence subjected to the safeguards of cross-examination and rebuttal, have said by their verdict that the punishment of death fits neither. Obviously, as already noted, if the jury had actually believed that the evidence proved appellant guilty beyond a reasonable doubt of a peculiarly brutal murder, the only reasonable assumption is that they could not have come to their conclusion that life imprisonment would "fit the crime". The judge, on the other hand, indicates no disagreement with the jury's conclusions, on the basis solely of evidence before the jury, but only on the basis of that evidence when considered in connection with other information secretly received by the judge after verdict. To this information the judge applied no safeguards of cross-examination or rebuttal, which might have enabled him to determine intelligently, whether death provided a "better fit" both for the offender and the crime. In this connection, as will be shown in detail under "X", *post.*, the major and most prejudicial portion of such information did not come from probation reports, but from police officers charged with extorting appellant's confessions.

(2) It has been seen under "VII" that the statement in the majority opinion that "modern changes in the treatment of offenders make it more necessary now than a century ago for observance of the distinctions in the evidential procedure in the trial and sentencing processes" is in conflict both with the recommendations of this Court's own

Advisory Committee on Rules of Criminal Procedure and with the expressed views of the only Federal Courts which would seem to have considered the question.

X.

The majority report states, pp. 8 and 9:

> **"Under the practice of individualizing punishments, investigational tactics have been given an important role. *Probation workers* making reports of their investigations have not been trained to prosecute but to aid offenders. *Their reports* have been given a high value by conscientious judges who want to sentence persons on the best available information rather than on guesswork and inadequate information."**

Here is a statement to which no exception can be taken except in the application made of it by the majority opinion to appellant's case, which again is grimly ironical. Even assuming that the trial judge here was conscientious, there is certainly no evidence of any want on his part to sentence appellant only "on the best available information, rather than on guesswork and inadequate informtaion". The sole indications from his own statements, are to the contrary.

As has already been noted, it appears from the judge's own narration of the pre-sentence information on which he felt justified in undertaking to deprive appellant of his life, that, in its major and more prejudicial parts, it was obtained not from probation reports, but from the very police officers charged with extorting appellant's purported confessions.

As the judge's own statements show, the only portions of the pre-sentence information upon which he acted which were obtained from probation sources, were: appellant's delinquency record as a minor (R. 12); the indication in the probation report that defendant "is a psychopathic liar

and that his personality is permeated with psycho-sexual habits of thought and conduct" (R. 16); and the conclusion of the Probation Department that appellant is "a menace to our society" (R. 19).

All the rest of such pre-sentence information is obviously obtained from police officers who are specifically named in the statement. These are Detectives Rooney, Cullen and Werner, and Patrolmen DeVivo and DiLorenzo (R. 15, 16). All of these officers were charged by appellant, both in his direct testimony and on cross examination, as having extorted his purported confessions by the most brutal methods, (see for instance Tr. 692, 701, 707-712; other record citations are too numerous to be made here). An examination of the record will show, moreover, that while appellant's charges against these officers were detailed and circumstantial, their denials were merely categorical (Tr. 983, 991, 1001-1003, 1010).

While, unfortunately, under this appeal, this Court cannot determine whether or not appellant's purported confessions were in fact extorted, this Court should consider the fact that the record shows that the major and most prejudicial portions of the pre-sentence information, upon which the judge avowedly undertook to justify his rejection of the jury's recommendation of life imprisonment and to justify his own sentence of death, came from the very police officers alleged to have extorted appellant's purported confessions, *whose denials the jury obviously did not wholly credit.* This information consisted largely of unsupported charges that appellant had been guilty of some 30 other burglaries which he had never even been previously charged, much less convicted, and of indecent criminal sexual acts of which he had likewise never been charged.

much less convicted. Of all of these unverified charges the judge avowedly concluded appellant to be guilty, and acting on such conclusions, sentenced appellant to death. This may not serve to impugn the Judge's conciance. Otherwise, however, his conduct cannot be squared with the standards set by the majority report itself for "concientious judges," as such, the

> "want to sentence persons on the best available information rather than on guesswork and inadequate information."

XI

The majority opinion, immediately following the statements just quoted in "X", states as follows, pp. 9 and 10:

> "To deprive sentencing judges of this kind of information would undermine modern penological procedural policies that have been cautiously adopted throughout the Nation after careful consideration and experimentation. We must recognize that most of the information now relied upon by judges to guide them in the intelligent imposition of sentences would be unavailable if information were restricted to that given in open court by witnesses subject to cross-examination. And the modern probation report draws on information concerning every aspect of a defendant's life. The type and extent of this information make wholly impractical if not impossible open court testimony with cross-examination. Such a procedure could endlessly delay criminal administration in a retrial of collateral issues.
>
> "The considerations we have set forth admonish us against treating the due process clause as a uniform command that courts throughout the Nation abandon their age old practice of seeking information from out-of-court sources to guide their judgment toward a more enlightened and just sentence."

These statements are unsound and inapplicable to appellant's case in the following particulars:

(1) Appellant's contentions do not involve depriving sentencing judges of "this kind of information", that is, *the kind of information specified in the majority opinion itself* in the immediately preceding sentence, i.e., *"the best available information rather than guesswork and inadequate information."*

On the contrary, appellant's contentions are consistent with modern penological procedural policies which recognize that a truly conscientious *and intelligent* judge will adopt at least such minimum procedural safeguards against pre-sentence mis-information as those noted under "VII" in connection with the recommendation of this Court's Advisory Committee on Rules of Criminal Procedure, and as suggested in the opinions of the respective federal courts in *Stephan* v. *United States, supra*, and *Zeff* v. *Sanford, supra*. See also appellant's Assignment of Error "2", Brief p. 13.

(2) The remainder of the foregoing statements, so far as appears, rest on pronouncements of the majority opinion, without apparently any precise citation of authority to sustain them. Counsel, however, is able to cite at least one respectable authority which makes the validity of such statements more than doubtful.*

In the Columbia Law Review of April 1949, Volume 49, No. 4, pages 567-572, under the title "Right of Criminal Offenders to Challenge Reports Used in Determining Sentence", these very assumptions of the majority opinion are considered in detail, pp. 570-572, and the conclusion is reached, p. 572, that

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*Counsel has reason to believe that additional authorities exist of like purport. The Court, however, has denied counsel adequate opportunity to determine this.

> "* * * the risk of injustice to the defendant would seem to outweigh contrary considerations of administrative convenience".

In support of this conclusion, reference is made to the English practice as shown by cited Act of Parliament and by judicial authorities also cited. There are also citations and quotations from American judicial authorities, *pro* and *con*, footnote 15, p. 568, and in footnotes 19, 20 and 21, p. 569. *Appellant's counsel, on argument, furnished this Court with the majority of these citations, but it is notable that the majority opinion neither makes any reference to them,* nor appears to have considered how far they may be inconsistent with its own pronouncements.

XII.

The majority opinion states, p. 10:

> **"The due-process clause should not be treated as a device for freezing the evidential procedure of sentencing in the mold of trial procedure. So to treat the due-process clause would hinder if not preclude all courts—state and federal—from making progressive efforts to improve the administration of criminal justice."**

It must again be noted that appellant's contentions involve no proposal "for freezing the evidential procedure of sentencing in the mold of trial procedure". (See appellant's Assignment of Error 2, Brief p. 13; also comments under "VII", "VIII" and "XI", *ante.*).

Moreover, the assumption in the majority opinion that the New York statutes, *in denying a convicted person any protection whatever* against the obvious potentiality that, under such circumstances, the judge may base his sentence on pre-sentence *mis-information*, are consistent with "pro-

gressive efforts to improve the administration of criminal justice", is an assumption sustainable only on the same reasoning which is only too widely indulged, that totalitarian concepts are "progressive" in comparison with democratic and republican ones.

XIII.

The majority opinion states, p. 10:

> **"It is urged, however, that we should draw a constitutional distinction as to the procedure for obtaining information where the death sentence is imposed. We cannot accept the contention."**

This is one of the most basic and obvious fallacies of the majority opinion. Aside from the possible technical constitutional distinctions in this respect, between capital and non-capital cases, pointed out in appellant's brief, pp. 22-24, there is a fundamental and inescapable distinction.

Assuming that in a non-capital case a convicted defendant is accorded no safeguards such as the right to inspect, cross-examine, or rebut pre-trial information used by the judge as the basis of his sentence, and that it subsequently develops that as a result, such sentence was excessive because based on pre-trial *mis-information,* under the statutes of at least penologically "progressive" jurisdictions, judicial remedies are available to reduce the sentence, or in the absence of judicial remedies, provisions for reduction are generally made in the probation or parole statutes, themselves, or as a last resort, through executive clemency.

No such correction is possible of a capital sentence resulting from pre-trial mis-information resulting from the denial of any procedural safeguards, whatever. A capital sentence based on such mis-information is irreparable in

its finality. For the majority opinion to deny that such a basic distinction exists is to refuse to face the realities with which its conclusion in their respect is wholly inconsistent.

XIV.

The majority opinion states, p. 11:

> **"And it is conceded that no federal constitutional objection would have been possible if the judge here had sentenced appellant to death because appellant's trial manner impressed the judge that appellant was a bad risk for society, or if the judge had sentenced him to death giving no reason at all. We cannot say that the due-process clause renders a sentence void merely because a judge gets additional out-of-court information to assist him in the exercise of this awesome power of imposing the death sentence."**

This statement is not an entirely accurate paraphrase of the concessions actually made by appellant's counsel. The first concession appears in the first footnote to page 14 of appellant's brief. The second appears in paragraph (1) of the footnote to page 28 of that brief.

The first concession was that the constitutional question here raised does not involve any contention that the New York statutes may not validly give the trial judge, as they have been construed to do, *People* v. *Cole,* 285 N. Y. 838, discretion to disregard the jury's recommendation of a life sentence and to sentence an accused to death, where such discretion is exercised solely on the basis of evidence received before verdict under safeguards of cross-examination and rebuttal.

The second concession was that while the constitutional point here raised might still have been advanced, it could not have been proved, had the trial judge obtained presentence information precisely as he did here, without any

safeguards of cross-examination or rebuttal, but had omitted his avowals, and had said nothing which would disclose that this information was essentially the basis for his sentence of death.

Counsel now believes that neither was he warranted in making such concessions, nor was the majority opinion warranted in relying on them, since such concessions, either as actually made or as paraphrased in that opinion, have no relation to the realities of this case.

Under Section 482 of the Code of Criminal Procedure of New York,* a judge is expressly *required* before pronouncing sentence, to have submitted to him any reports that may have been made as a result of a mental, psychiatric, or physical examination of a defendant, and in addition is *permitted* to seek any information that will aid him in determining the proper treatment of a defendant. It is highly improbable in view of the duties imposed upon the Probation Department under other sections of the New York statutes, that in any case no reports would be made of mental, psychiatric or physical examination of a defendant. It is reasonable to assume, therefore, that in all cases, a judge, before pronouncing sentence would have such reports before him and might, as here, have additional information, as well, from other sources. Under the assumption of the majority opinion, moreover, it would be wholly impracticable to safeguard any such information by cross-examination, rebuttal or even inspection. In any case, therefore, should the judge reject the jury's recommendation of life imprisonment and sentence a defendant to death, it could neither reasonably nor safely be assumed that in so doing he was wholly un-

*This section is set out verbatim at page ii of Appendix A of appellant's brief.

influenced by such unsafeguarded pre-sentence information, irrespective of any avowals which judge might or might not make in this respect.

XV.

The majority opinion states, p. 11:

> **"The case went to the highest court in the state, and that court had power to reverse for abuse of discretion or legal error in the imposition of the sentence."**

These statements are basically unsound in law and seriously misleading when applied to the facts of appellant's case.

Conceding that the Court of Appeals would have the general power to reverse a sentence for abuse of discretion or for legal error in its imposition, that court, under its own judgment, could not have reversed appellant's sentence in this case on either such ground, since the judgment of that court expressly construes the statutes of the State of New York here in question, as authorizing both the trial court's sentence of death and the precise manner of its imposition (R. 21, 22).

XVI.

The majority opinion states, p. 11, footnote 18:

> **"What we have said is not to be accepted as a holding that the sentencing procedure is immune from scrutiny under the due process clause. (See *Townsend* v. *Burke*, 334 U. S. 736)".**

To such extent as this statement is intended, if at all, as any reassurance that, despite the majority opinion in this case, some rights of due process may still attach to sentencing procedure in the receipt of pre-sentence informa-

tion, it is respectfully submitted that so far as such reassurance is not treated—justifiably or otherwise—with complete skepticism, it can only result in increasing applications for *ad hoc* scrutiny in this respect of both capital and non-capital pre-sentencing procedure by one form of review or another.

Counsel respectfully submits that, truly, "progressive efforts to improve the administration of criminal justice", interrelated as they must be with the "modern philosophy of penology", requires this Court to give most careful reconsideration to an opinion *which is reasonably susceptible only of the interpretation that no safeguards of due process of law, whatever, can practicably attach to the receipt by a trial judge of pre-sentence information even in a capital case*, although it seems undeniable that without some safeguards, *pre-sentence misinformation in a capital case* may result in a sentence that is irreparable, while in a *non-capital case* any resulting excessive sentence can be readily mitigated.

XVII.

The majority opinion certainly attempts no express answer to the following basic propositions advanced on behalf of appellant, both on brief and argument, against the constitutionality of the New York statutes here involved, viz:

(1) Due process of law under the 14th Amendment includes as indispensable elements in a capital case, the right of a defendant to cross examine and rebut the testimony of witnesses against him, and to such confrontation as is necessary for those purposes.

(2) Since such rights are essential elements of due process of law under the 14th Amendment, a defendant in a capital case is entitled to be protected in them against *any*

agency of the State authorized to deprive him of his life, and *at the point* at which such deprivation is authorized and undertaken.

(3) Where, as here, the statutes of a State authorize the trial judge in a capital case to disregard the jury's recommendation of a life sentence and to sentence an accused to death, such statutes must also require that the trial judge observe such rights *in connection with such sentence of death*, if such rights are to have any substantial meaning *at the only point* at which the State has, in fact, undertaken to deprive appellant of his life.

(4) The statutes of the State of New York, here involved, are therefore repugnant to the due process clause of the 14th Amendment, since the Court of Appeals of that State has construed such statutes as authorizing the trial judge, *on sentence*, to deprive appellant of his life on the basis of information obtained by the judge after verdict, from witnesses as to whom appellant was afforded no right of cross examination or rebuttal, nor the confrontation necessary for such purposes.

Any answer to these basic propositions, which may be intended to be implied in the assumptions of the majority report, must fail with the demonstration, which has here been made, of the basic invalidity or inapplicability here of every major assumption of that opinion.

Finally, it is respectfully submitted that this Court should revise the majority opinion so as to recognize that it is both constitutionally necessary and procedurally practicable to require a State to provide such safeguards in the use of pre-sentence information as the basis of sentence in a capital case, as will reasonably minimize the risk that such information may, irreparably late, be discovered to have been in reality, pre-sentence misinformation. It is submitted that for this Court finally to hold, as does the ma-

jority opinion, that it is neither constitutionally required nor procedurally practicable that a State provide any safeguards whatever in such respects, is to risk a shocking miscarriage of justice, not only in appellant's case, but in every case where pre-sentence information is authorized to be so used.

Accordingly, it is respectfully asked that this petition for re-hearing be granted, with such stay of the mandate as is reasonably necessary to determination of this case on re-hearing.

Respectfully submitted,

JOHN F. FINERTY,
Counsel for Appellant,
120 Broadway,
New York 5, N. Y.

June 21, 1949.

CERTIFICATE OF COUNSEL

I hereby certify that the foregoing petition for re-hearing and for stay of mandate is presented in good faith and not for delay.

JOHN F. FINERTY